

PRIVATE EDUCATION IN SOUTH AFRICA: THE LEGAL STATUS AND  
MANAGEMENT OF PRIVATE SCHOOLS

by

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## DECLARATION

I declare that **Private education in South Africa: the legal status and management of private schools** is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

.....  
Signature

(Mrs) JM Squelch

.....  
Date

## **ABSTRACT**

World-wide, the nature, purpose and existence of private education has evoked intense interest and controversial debate. For many, private education presents a legal-moral dilemma. On the one hand, it is recognised as a fundamental right in terms of freedom of association, religion and culture. On the other, it raises perplexing moral and philosophical issues about social exclusivity, selectivity and elitism. Notwithstanding the equally compelling legal, social, economic, educational and political arguments for and against private education, private schools in South Africa, which are increasing in number, continue to form an essential and permanent part of the education system.

Private education is a complex subject which can be researched from a myriad of perspectives. This study is essentially a legal enquiry into the legal status of private schools in South Africa within the new democratic constitutional dispensation and how the law affects the organisation, governance and management of private schools. To this end, the study is confined to a discussion on legal aspects relating to private school governance, public funding of private schools, teachers' appointments and discipline, student admission and discipline and religious freedom. In discussing the legal context of such topics, a number of issues emerged concerning the complex nature and diversity of private schools, the relationship between the State and the private school sector, the right of private schools to exist and the implications of the bill of rights for private schools. Furthermore, the study raises challenging questions about the issues of choice, autonomy, religious freedom and diversity, which lie at the heart of the establishment and maintenance of private schools in a democratic society.

Finally, one of the difficulties of conducting such a study is that South African law is complex and changing, and it is still in a state of evolution, given the recentness of the Constitution and the bill of rights. This means that while some legal issues pertaining to private schools are fairly well settled, for the most part it is not possible to provide a comprehensive or definitive statement about complex and often highly sensitive issues but merely to pose various legal-education questions and problems for consideration. In time, many of the issues raised will no doubt be settled by the courts.

**Key terms:** Private education; Independent schools; School administration; School financing; Human rights; Private school law; Private law; Public law; South African law; Constitutional law; Administrative law; Company law; Legal research; Educational research

## **DEDICATION**

To my loving husband,  
Andrew

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Joan Squelch

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## **ABBREVIATIONS**

AWR	Association of Women Religious
BCLR	Butterworths Constitutional Law Reports
CC	Constitutional Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
CNE	Christian National Education
DET	Department of Education and Training
ECAR	Education Council of Associations of Religious
ECHR	European Convention on Human Rights
EHRR	European Court of Human Rights
HED	Head of Education
HMC	Conference of Headmasters and Headmistresses
HSRC	Human Sciences Research Council
MEC	Member of the Executive Council
SACBC	South African Catholic Bishops' Conference
UNDHR	United Nations Declaration of Human Rights
USA	United States of America
UK	United Kingdom

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## **CHAPTER 1**

### **INTRODUCTION, AIMS AND STRUCTURE**

#### **1.1 INTRODUCTION**

World-wide, private schooling is a controversial issue with views ranging from those who avidly support complete abolition to the more pragmatic view of those who are prepared to tolerate private schools provided they are not funded by the State. In spite of such varying viewpoints, private schools continue to exist and increase in almost every country of the world.

In South Africa, private schools have always been an important feature of the education system. For several centuries, children have been educated in private schools, which can be traced back to 1652 when the first European settlers arrived at the Cape of Good Hope. Up until the second half of the 19th century, formal education that was available was mainly religious and under the control of churches and missionaries. Private schools were also established on farms to provide education to the labourers' children. Initially there were only a few private schools, but their numbers mushroomed during the 19th century (Behr 1984:81) and they are now an integral part of the education system. Over the years, private schools have played a significant role in shaping and developing education in South Africa. In spite of this there is surprisingly very little research available on private schools, especially in terms of the legal foundations and the implications for school management. The private school debate in South Africa has been largely preoccupied with the issue of race and segregation. Paradoxically, the private schools have been in the forefront of promoting and establishing non-racial education. Any discussion on the origin, development and operation of private schools, and the challenges facing them, now and in the future however, cannot be separated from the legal context, which is becoming an increasingly important facet of education, especially in view of the South African bill of rights.

Private schools, like all other social institutions, are governed by the law and operate within an established legal structure. The law influences activities such

as control, finances, personnel matters, access, school policy, discipline and external relations. In the history of private education in South Africa, legislation has played a very significant role, especially in terms of control and degree of autonomy. Unlike countries such as the United States where there is a complete separation of private schools from the State, in South Africa the State plays a major role. The relationship between the State, the primary legislator, and private schools, however, has been characterised by a great deal of tension and conflict especially since 1976, which signalled a turning point in education in South Africa (Christie 1990a:30-34).<sup>1</sup>

Since 1992, the South African education system has experienced far-reaching change which has also affected private education. The establishment of a new single non-racial education system, the restructuring of education, the rationalisation of educational resources and the implementation of the new democratic Constitution with its justiciable bill of rights has important implications for private education. Issues relating to the future role and position of private schools in South Africa and their legal status in a non-racial democratic system raise numerous interesting questions with regard to issues such as choice, access to education, segregation versus desegregation, freedom of expression, religious rights, discipline and natural justice. While there is little doubt that private schools will continue to play an important role in education in South Africa, the nature, role and position of private education is likely to change as a result of the new constitutional dispensation.

### **1.1.1 Rationale for and significance of study**

With the current emphasis on legal issues, especially in the light of the bill of rights, legal research has become a matter of increasing interest. In view of the legal responsibilities connected with various aspects of managing the school, for instance, legal research is of particular interest for school managers and governors, as well as those with a vested interest in education. In recent years, especially since the 1994 general elections, schools (including private schools) have had to face a great number of important legal issues concerning both students and teachers in matters of constitutional rights, funding, desegregation, democratic governance, parent participation, student admissions and so forth. These are just a few of the many legal issues that need to be researched in the

South African context. To this end, this study makes a valuable contribution to the debate on and the development of education policy, and should be of value to those involved in the formulation and implementation of educational policy on private education.

Besides the very limited legal research in the field of education in South Africa, there is also surprisingly very little research on private education and many issues relating to private education remain under-researched. The few studies that have been conducted have focused mainly on political and/or social issues.<sup>2</sup> Moreover, contemporary discussions on private education are largely journalistic. The purpose of this study is therefore to examine the legal status of private schools and how the law affects key managerial issues. The central concern of the thesis is understanding what education law is, how the law has shaped private education and how it influences the internal operations of private schools. While there are many more studies on school management, few, if any, have been done on the management of private schools from the legal perspective. In the light of this, the research will contribute to advancing the field of education law in general, and in particular to the further development of private school law in South Africa.

### **1.1.2 Demarcation of the field of investigation**

Private education is a complex concept and is open to many different areas of research. This study is confined to primary and secondary registered English-speaking private schools. The bulk of the research was conducted between July 1994 and November 1996, at a time when the South Africa education system was undergoing far-reaching change and the new post-apartheid legalisation was, and still is, evolving. Therefore, this study takes cognisance of old and new legislation and is located within the framework of the Constitution of the Republic of South Africa Act 200 of 1993. Legislation that commenced after November 1996 was not considered for the purpose of this study. For this reason, the Constitution of the Republic of South Africa Act 108 of 1996, that was formally adopted in December 1996, was not dealt with (see section 6.3.6). However, for the purpose of comparing sections and cross-referencing, relevant provisions from the 1993 and 1996 Constitutions are tabulated in Appendix C.

## 1.2 THE LEGAL FRAMEWORK

This study is conducted from a legal-educational perspective which implies an interface between two separate fields of study, namely education and law. Therefore, in this section, the legal framework of the study is given. Before investigating the topic it is useful to first understand what is meant by the law and education law, and to place education law within the context of the South African legal system. The investigation into legal issues relating to the governance and management of private schools is conducted within this legal framework.

### 1.2.1 What is law?

A primary goal of legal research in education is to understand what the law actually is as it applies to education. This forms the foundation of this study. Although the field of law is seemingly clearly defined, there is no single theory or definition of what law is or ought to be. The concept 'law' is often used in a variety of contexts and can be viewed from many different perspectives.<sup>3</sup> In its widest sense, Zuker (1988:3) defines law as a 'regime of adjusting relations and ordering human behaviour through the force of a socially organised group'. Shoop and Dunklee (1992:3) view law as something which 'regulate[s] human conduct in order to ensure a harmonious society'. They also state that a law is a 'civil rule commanding what is right and what is wrong'. In similar vein, Stephen (1989:14) defines law as the 'sum total of rules governing individual and group behaviour that are enforceable by the courts'.

Implied in these and other definitions is the fact that laws are enforceable rules created by man to direct and control human conduct for the primary purpose of creating order and harmony in society. All spheres of society are therefore governed by the law. For the purpose of this study, law is viewed as a complex set of interrelated *rules* and *principles* that govern and direct human behaviour and have legal force. However, law is not seen as something which is purely objective, value-free, neutral and separate from morality.<sup>4</sup> The role of *values* in the legal process is recognised. The law reflects the social, political and philosophical values a community chooses to pursue (Welch 1987:3). Moreover, the law is created and interpreted by people who have personal views, biases and value systems (McCarthy & Cambron-McCabe 1992:vii). The law is also not

static. Hurlbert and Hurlbert (1989:1) point out that laws are dynamic and subject to change since the needs, aspirations and values of the individuals and groups they serve are constantly changing.

### **1.2.2 The meaning and place of education law in the South African legal system**

Education is part of society that is also governed by the law. The law governs education as it orders the rest of society (Beckmann & Prinsloo 1989:7) and regulates human conduct to ensure a harmonious society (Shoop & Dunklee 1992:3). The law, for example, creates schools, prescribes certain educational activities, bestows certain powers, duties and rights on school governors, principals and teachers, and creates structures for education administration. The law also limits the powers and activities of educational bodies and functionaries and protects peoples' rights. Essentially, the law serves to order and harmonise relations in education.

#### **1.2.2.1 Classification of South African law**

South African law is divided into *substantive law* (also called material law) and *adjective law*, which are interdependent. Substantive law is that part of law which determines the content and meaning of the different legal rules. It also determines the content and application of the different rights which individuals may have. Adjective law is that part of the law which regulates the enforcement of the substantive law. In other words, it determines the manner in which a case must be practically dealt with when a legal rule has been violated (Kleyn & Viljoen 1996:101). Adjective law includes the law of criminal procedure, civil procedure, law of evidence and interpretation of statutes. Substantive law is more complex and is categorised according to two major divisions, namely private law and public law (see Figure 1.1). These fields can be distinguished but not entirely separated.

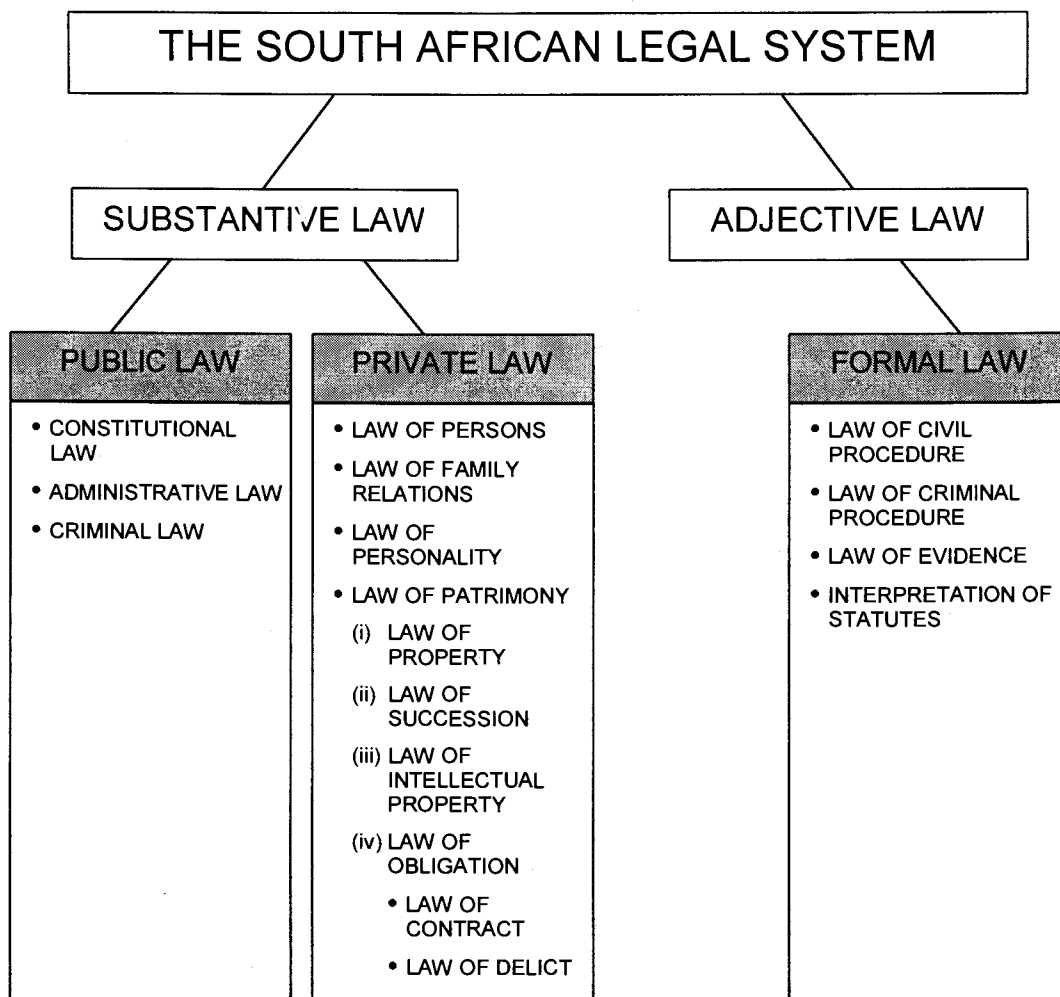
Private law is that branch of law which is concerned with the interests of private individuals or persons. It is concerned with the equal relationship between legal subjects and is therefore described as a horizontal relationship. Equality is used in the sense of equality before the law and thus does not exclude relationships of

authority such as those between guardian and minor. Subdivisions included in private law are: law of persons, law of family relations, law of patrimony, law of property, indigenous law and commercial law (Kleyn & Viljoen 1996:105-109). Public law, on the other hand, governs relationships with a view to protecting public interest. In a broad sense public law deals with the vertical and unequal relationship between the State and the individual, as well as the organisation and constitution of the State itself. It determines the extent and nature of state authority. Subdivisions included in public law are: public international law, constitutional law, administrative law and criminal law (Kleyn & Viljoen 1996:104).

Constitutional law consists of rules according to which a state is run. It is the 'aggregate of binding rules which relate to the distribution or exercise of state authority' (Carpenter 1987:7). The rules of constitutional law govern the relationship between organs of the state, and between the organs of state and subjects. Administrative law is part of constitutional law and consists of rules governing the organisation, powers, actions and capacities of day-to-day administration (Wiechers 1985:4-5). Criminal law determines which acts amount to criminal offences and how these offences must be punished.

#### 1.2.2.2 Education law as part of administrative law

All aspects of education are governed by a complex system of legal rules and principles. As a specialised part of the South African legal system, education law is traditionally classified under the public law system as part of administrative law (see Bray 1988; Van Wyk 1983). In education, administrative law thus regulates the organisation, powers, actions and capacities of state administration concerned with education, such as education departments, schools, school boards, school governing bodies, professional teachers' councils and other educational structures and functionaries. However, education law is complex and multidimensional. In addition to the Constitution and administrative law, a vast body of legal rules and principles governing education come from different parts of the law, both private and public. For example, education law embraces criminal law (the use of excessive corporal punishment), the law of delict (failure to provide a safe environment for students) and law of contract (employment contract between teachers and the employer).



**FIGURE 1.1 Classification of the South African Legal System**

#### 1.2.2.3 Sources of law

The body of legal rules and principles governing the organisation and structure of schools as well as all the activities that are conducted in a school are found in the sources of law. Sources of law refer to the 'places' where the law originates and where it can be found. The sources of law include the Constitution, statutory law, common law and case law.

##### *(a) The Constitution of the Republic of South Africa Act 200 of 1993*

The Constitution of the Republic of South Africa Act 200 of 1993 is the supreme law of the land and marks a radical departure from past constitutional practices.

It provides parliament with the powers to pass legislation and the courts with a testing right so that they can test all legislation, including education legislation, against the provisions set out in the bill of rights. This is embodied in section 4(1) which stipulates that the 1993 Constitution is the supreme law and that any act which conflicts with it is invalid. The relationship between the 1993 Constitution and private education is discussed in chapter 3. In terms of the management of private schools, the South African bill of rights (chapter three of the Constitution) is relevant (see section 6.3.6 for a comment on the Constitution of the Republic of South Africa Act 108 of 1996).

#### *(b) Statutory law*

Statutes are made by an organ of the state vested with legislative authority. In terms of the Constitution, parliament (which consists of the National Assembly and the Senate) is the highest legislative authority. Parliament will pass legislation of a national nature (eg, on defence, the national budget, etc) and on other specific matters where national legislation would be more suitable (eg, national education policy, norms and standards).

Other legislative authorities include the legislatures of the provinces and local governments. Although the national parliament is the highest law-making body, the provincial legislatures also have original and comprehensive powers to pass laws on matters of a provincial nature (eg, provincial education - public and private primary and secondary schools, provincial health and welfare, tourism, road traffic, etc) (section 126 and schedule 6 of the 1993 Constitution). In specific cases, provincial laws may even prevail over national laws that deal with such topics.

South African schools are therefore governed by statutes enacted by the central legislature (ie, the national parliament) and provincial legislatures. Although the provincial statutes on education may vary from one province to the next, they are essentially the same. In general, they provide a legal framework and basic legal principles for the provision, governance and functioning of education.

Parliamentary and provincial legislation is complemented by various administrative legal *rules and regulations* which are also an important source of



law. They form a comprehensive body of law known as subordinate legislation which must be expressly authorised by the enabling statute. Subordinate education legislation consists of ministerial regulations, departmental regulations, circulars, manuals and other documents. Local governments usually have subordinate legislative powers, which means that they derive their law-making power from an enabling statute, empowering them to make laws, which is usually a parliamentary or provincial statute. Each education department is responsible for drafting rules and regulations which are essentially an extension of the main statute. Although many departmental documents are not legal documents per se, they provide schools with important guidelines on how to implement legal requirements laid down in original and delegated legislation. Thus they serve as highly persuasive authority but are not mandatory.

*(c) Common law*

According to Kleyn and Viljoen (1996:85), when a matter is not governed by legislation, common law is applied. Many of the general legal principles that we live by come from common law. For example, the fact that a buyer is obliged to pay an agreed amount when taking possession of something. This principle derives from Roman law and not modern legislation. Common law is thus that part of the law that is not enacted by parliament, that is, nonstatutory law. It is essentially an accumulation of legal precepts that have developed over time and are found in the works of legal writers and case law. South African common law developed from Roman-Dutch law and English law and for this reason is often described as a hybrid system.

*(d) Case law (judicial precedent)*

Case law is a further important source of law. Once an Act has been passed, it has to be interpreted. The role of the courts is mainly to interpret and apply the law in a bid to seek clarity on a wide variety of issues with a view to settling a dispute or controversial issue. In the process of interpreting and applying the law, judges also create law. Case law is therefore made up of legally binding decisions of the courts.

In South Africa, case law is characterised by the *stare decisis* doctrine ('let the decision stand'). When a court has handed down a principle of law which is applicable to a particular set of facts, the court will tend to follow that principle and apply it to future situations. This means that the decisions of the superior courts form binding precedents that must be followed by the lower courts. This principle is justified on the ground that it brings certainty to the law because of its consistency and general applicability (Du Plessis & Kok 1981:25).

### **1.3 STATEMENT OF THE GENERAL RESEARCH PROBLEM**

The purpose of this study is to investigate legal aspects relating to the governance and management of private schools in South Africa from a legal-educational perspective. The central question addressed in this study is as follows:

*What is the legal status of private schools in South Africa and how does the law affect the organisation, governance and management of private schools in practice?*

This study is further sub-divided into the following questions.

- (1) How has the law influenced the development of private education in South Africa?
- (2) What is the philosophical and legal case for private schools?
- (3) What is the legal position of private education in the new South African constitutional dispensation?
- (4) What is the legal status of private schools in South Africa? and
- (5) How does the law influence the internal governance and management of private schools with reference to ownership, governance, finance, teachers' appointments and discipline, student admission and discipline and religious practices?

## **1.4 AIMS OF STUDY**

The aims of the study are to:

- (1) describe the historical development of private schools from a legal perspective (chapter 2)
- (2) discuss the nature, purpose and legal position of private education in South Africa (chapter 3)
- (3) identify and discuss certain key managerial issues relating to private schools from a legal perspective (chapter 5) and
- (4) summarise key issues to emerge from the study (chapter 6)

## **1.5 RESEARCH APPROACHES**

Because this study is conducted from a legal-educational perspective, the research approach is twofold in that the study has been based on descriptive and legal research. Empirical data has been used, but the thrust of the research is more descriptive than empirical.

### **1.5.1 Descriptive research**

Descriptive research is concerned with the description and analysis of a current phenomenon. Best (1970:116-117) defines descriptive research as that which is:

concerned with conditions or relationships that exist; practices that prevail; beliefs, points of view, or attitudes that are held; processes that are going on; effects that are being felt or trends that are developing. At times descriptive research is concerned with what is or what exists and is related to some preceding event that has influenced or affected a present condition or event. ... Descriptive research goes beyond gathering data. It involves an element of analysis and interpretation of the meaning or significance of what is described.

This study is descriptive in that it is concerned with the existing status and condition of private education as well as relationships, practices and processes, both educational and legal, that concern private education.

### **1.5.2 Legal research**

Fraenkel and Wallen (1990:7) define legal research as a 'careful, systematic patient study and investigation in some field of knowledge undertaken to discover or establish facts and principles'. In this study, legal research is undertaken in the field of education law with a view to discovering, describing and interpreting a wide body of legal facts and principles relating to the legal status and management of private schools.

Stephen (1989:6) uses the phrase 'legal research' to mean 'all the activities involved in answering questions about the law'. He also notes that 'achieving the highest quality of legal research requires a commitment to perseverance, patience and a belief in yourself'. Schumacher and McMillan (1993:442) refer to legal research as a specialised form of historical analysis which studies the meaning of law. It is analytical in that it is mainly descriptive and includes noninteractive document research. Legal studies identify legal principles from an analysis of judicial interpretations of the law and of constitutions and statutes.<sup>5</sup>

In education, the purpose of legal research is essentially to understand current educational phenomena in terms of the law, to discover how these phenomena developed and to clarify issues concerning them, and become knowledgeable about what the law is as it applies to education (Schumacher & McMillan 1993:442-443; 463). According to Peterson, Rossmiller and Volz (1978:496), the purpose of legal research is to locate and analyse authoritative statements of the law. In sum legal research used in education can be defined as the systematic collection and evaluation of data to describe and explain legal principles that are relevant to educational activities. It helps the researcher to better understand the manner in which legal rules and principles are applied to education.

## **1.6 RESEARCH METHODOLOGY**

This section provides an explanation of the research methods used in this study.

### **1.6.1 Literature review**

A literature review forms an essential part of any research. Thorough legal research involves a systematic examination of an 'appropriate portion of the voluminous legal literature' (La Morte 1993:419). According to Schumacher and McMillan (1993:112-113), a literature review adds to an understanding of the selected problem and helps to place the study in a historical perspective. Moreover, it is necessary for developing an acceptable body of knowledge on an educational topic. It also enables the researcher to gain further insights into the topic. McMillan (1992:44-45) adds that a literature review 'provides an important link between existing knowledge and the problem that is being investigated'. In addition to this, a good thorough review helps to refine the problem, interpret findings and discover useful research techniques. Finally, it leads to new information and knowledge, which is fundamental to a thesis. Literature for review includes a variety of sources. The following three types of sources were used in this study.

#### **1.6.1.1 Primary sources**

Primary sources of law include some form of binding and highly persuasive authority. Constitutions, state statutes and court decisions are the most important primary sources (La Morte 1993:419). Another important source of primary law are the regulations and decisions that flow from administrative bodies (Zuker 1988:15). Although their authority is derived from statutes, their influence on and application in the field of education are significant for this study.

#### **1.6.1.2 Secondary sources**

Secondary resources are materials about the law that are used to explain, interpret, locate or update primary sources but which are not authoritative records of legal rules (Jacobstein & Mersky 1990:10). Secondary sources include textbooks, periodicals, law reviews, legal encyclopaedias and legal dictionaries (La Morte 1993:419).

### **1.6.1.3 Search aids**

A difficult aspect of legal research is to locate primary sources of authority and trace court cases. Search aids, which include digests of case law and various indexes, are available to assist researchers to locate subject matter of all cases reported.

### **1.6.2 Questionnaire**

A postal questionnaire was used to conduct a survey amongst private school principals on the effect of the law on certain aspects of school management. The main purpose for using the questionnaire was to gather information on specific issues that is not readily available and which is required to supplement the literature survey and analysis of legal documents. The development and administration of the questionnaire are discussed later in chapter 4.

### **1.6.3 Document analysis**

Best (1970:113) notes that document analysis deals with the systematic examination of current records or documents as sources of data. A significant aspect of legal research is to summarise pertinent statutes, trace further developments through related court decisions and to analyse the decisions in the light of the problem under investigation (Mouly 1978:173). In this study, an extensive body of national and international statutes, documents and cases are consulted. Interpreting and discussing court cases requires a systematic approach. For this reason the approach described by Kleyn and Viljoen (1996:84) was adopted. In each case the facts of the case are summarised and the legal question that is addressed in the case is identified and discussed. The finding and the reasons for the decisions (*ratio decidendi*) are presented.

### **1.6.4 Personal contact**

Personal and telephonic contact was made with principals of private schools, private school associations, researchers and legal experts in order to gather additional information and to confirm existing data.

### 1.6.5 Comparative analysis

International jurisprudence and constitutional jurisprudence of other countries form an important part of this study. The use of international law and comparable foreign case law is particularly important in the absence of South African precedent and legal authority, especially in the field of private education. The South African courts will need to consult international law to provide content and meaning to related issues. The 1993 Constitution clearly indicates that international law is to play a definite role in the South African legal system, especially in the field of human rights. According to section 231(4), 'the rules of customary international law binding on the Republic, shall, unless inconsistent with this Constitution or Act of Parliament, form part of the law of the Republic'. Also, according to section 35(1) of the Constitution, when interpreting chapter three, a court of law '... where applicable, *shall* have regard to public international law applicable to the protection of the rights entrenched in the Chapter, and *may* have regard to comparable foreign case law'.<sup>6</sup>

Although foreign judgments are considered *res iudicata* and therefore remain at the discretion of the court, they do provide essential legal trends and principles which can facilitate the interpretation.<sup>7</sup> Therefore, when dealing with legal-educational issues that are universal, for example parental choice, desegregation, private school finance and religious issues, examples are also drawn from foreign education and legal systems as a means of comparison in order to understand, explain and critically evaluate the South African position and explore the issues in a broader international context. Finally, the countries that are discussed in this thesis have been selected to illustrate the diverse ways in which private schools operate within a particular education and legal system. Such international comparative analysis is valuable in searching for general principles and avoiding narrow understandings and interpretations.

## 1.7 TEXT ORGANISATION

This thesis consists of six chapters. Chapter 1 serves to introduce the research topic. It describes the structure of the proposed investigation, which consists of: the legal framework, research problem, aims of the study, research methods and chapter summaries.

Chapter 2 outlines the historical development of private education in South Africa from a legal perspective. This historical survey facilitates an understanding of the development of private education in South Africa and lays the foundation for the key issues that are explored in the remaining chapters.

Chapter 3 discusses the nature and purpose of private education and the legal position of private education within the current South African constitutional dispensation.

Chapter 4 explains and describes the purpose, construction and administration of the postal questionnaire.

Chapter 5 focuses on legal issues relating to the management of private schools within the context of the broad legal-educational framework presented in chapter 3. The key policy issues of private school governance, private school finance, teachers' appointments and discipline, student admission and discipline and religious issues are discussed in the light of the research data obtained from the postal questionnaire and other research.

Finally, chapter 6 summarises the most important content of this enquiry and the key issues to emerge from the study. Recommendations for further research are also given.

## **1.8 KEY TERMS AND DEFINITIONS**

In order to ensure clarity of meaning, the following key terms that are used in this thesis are defined.

**Governance:** This term refers to processes whereby education policies are formulated and determined.

**Governing body:** A generic term used here to refer to the governing body of a private school whether the body is designated as a board of governors, board of trustees, board of directors or some other similar title.



**Management:** This term refers to the day-to-day organisation of school activities. Whilst the terms 'governance' and 'management' are often used interchangeably in literature, for the purpose of this thesis, they are given different meanings.

**Private schools:** A broad term used to refer to a wide range of schools that are owned and governed by a nonstate organ. Also referred to as 'independent' schools in the new South African school system.

**State:** This term is generally distinguished from government. However, for the purpose of this thesis, the term State is used to refer to the conglomeration of organs, instruments and institutions that are responsible for the public affairs of the country.

**Student:** This term is used synonymously and interchangeably with 'pupil' and refers to learners in primary and secondary schools. The term 'learner' is used in new education legislation.

**Teacher:** This term is used synonymously with 'educator'. The latter term is used in new education legislation.

## **1.9 SUMMARY**

This chapter has introduced the research problem and the methodological approaches. It also provides an explanation of the legal context in which the study was conducted. The purpose of legal research and the study of education law is essentially to become knowledgeable about the law as it applies to education. In South Africa the law of education is a relatively new and undeveloped field with very limited research. Therefore, a study of this nature is not only important for developing an understanding of education law but for developing a body of knowledge and research that will contribute to expanding the field of education law in South Africa.

Education law is a very vast and complex field. In this study, private education in South Africa, an aspect of education on which little has been written and researched in a legal context, is investigated from a legal-educational perspective. The primary aim is to gain a better understanding of the legal status

of private schools in South Africa in general and to explain and illuminate the legal basis of the management of private schools. Having provided this introductory chapter, it is important to provide a historical and legal context in which to understand the research problem.

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## ENDNOTES

- <sup>1</sup> In 1976 the Soweto school uprising took place. It was sparked off by the introduction of the use of Afrikaans as a compulsory medium of instruction. The protest resulted in a rejection of Bantu education and apartheid education. The Education and Training Act 90 of 1979 replaced the Bantu Education Act 47 of 1954. This signalled the first major legal change to Bantu education. Following this event, the Roman Catholic Church implemented a policy of non-racial education. This brought the Church into conflict with the State (Christie 1990a:10).
- <sup>2</sup> Three major studies of note on private education are provided by Christie (1990a), an investigation into Catholic schooling, Randall (1982) an account of the development of English private schools, mainly Anglican, in South Africa and Smurthwaite (1981) an account of the historical development of Roman Catholic education in South Africa.
- <sup>3</sup> Law is used in the sense of physical laws such as the law of gravity and the law of motion. In this sense a law means the formulation of some uniform rules of natural phenomenon (Hosten, Edwards, Church & Bosman 1995). Moreover, the field of law is informed by an array of legal theories ranging from legal positivism to natural law theories, legal realism and critical legal studies. For a discussion and analysis on these theories see Feinberg and Gross (1991) and Cotterrell (1989)
- <sup>4</sup> For a discussion on the relationship between law and morality consult Fuller (1964), who argues that law and morality cannot be separated, and Dworkin (1977), who argues that law is not solely comprised of rules and that a strict line cannot be drawn between law and morality.
- <sup>5</sup> Analytical research, as a style of qualitative enquiry, describes and interprets the past or recent past from selected sources. Researchers do not directly observe, measure or experiment with current educational phenomena nor are findings tested statistically. Instead, researchers use logical inductions to analyse traces of the past qualitatively, documents preserved in collections and/or participants' oral testimonies.

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- <sup>6</sup> The word *shall* is peremptory and means that courts are obliged to consult international law.
- <sup>7</sup> For an insightful discussion on the role of international law in interpreting the South African bill of rights see Dugard (1994). According to Dugard (1994:212), '... South African courts will be required to consult all the sources of international law recognised by article 38(1) of the Statute of the International Court of Justice...'

## **CHAPTER 2**

### **THE DEVELOPMENT OF PRIVATE EDUCATION IN SOUTH AFRICA: HISTORICAL AND LEGAL PERSPECTIVES**

#### **2.1 INTRODUCTION**

The historical development of public education in South Africa over the last 300 years is fairly well documented. The story of private education is less so, even though it has always formed an integral part of the South African education system and antedated public education. Since its existence, it has played a major role in shaping and developing education through innovation and change. Private education has provided important alternatives to public education and created a wide range of educational opportunities and experiences for many people. The development of private education is woven into the political, social, economic and cultural history of a country. Similarly, the law has also had an impact on the historical development of private education, which, in turn, is influenced and shaped by various social factors, and is a reflection and manifestation of political and social developments of the time.

The influence of the law on private education, however, is not as well documented as that of other social factors. Therefore, in this chapter an overview of the development of private education in a historical and legal context is given. The discussion reviews a body of law that has affected the development and provision of private education from the early settlement at the Cape to the 1990s. The benefit of such a discussion is that it provides more insight into issues such as the legislative efforts to control private schools, financing (which remains a controversial issue today), the development of state policy on private schools and challenges private schools faced as the public sector grew. It also provides an insight into the reasons for the rise of private schools in South Africa and the development of the legal relationship between the State (and the public sector) and private education. Moreover, it provides the context within which to examine the research problem. Although this chapter focuses on the impact of the law on the development of private education, this cannot be separated from the emergence and development of the public school system. Education legislation

has dealt mainly with the development, organisation and administration of the public school system, some of which has included provisions pertaining specifically to private schools. However, various laws pertaining to public education have in varying ways affected private education. Therefore, general education legislation is discussed where appropriate and reference to public education is integrated throughout the discussion.

## **2.2 AN OVERVIEW OF THE DEVELOPMENT OF PRIVATE EDUCATION IN SOUTH AFRICA IN A HISTORICAL AND LEGAL CONTEXT**

The discussion in this section is organised according to five periods in the history of South Africa. Each period represents a significant stage of development in the history of South Africa, in general and in education, in particular. As in most countries, South African education has progressed through distinct stages, including a period of informal and mainly private education, followed by the establishment of a State system of education and increased State monopoly over education, and the modernisation of education.

The first period up to 1910, signified the establishment of the first private schools, which were mainly church schools, and the nucleus of a State system. The second period is between 1910 and 1945 when the four colonies were consolidated under the Union of South Africa and state control over education increased and education legislation became more formalised. The third period, between 1945 and 1976, deals with the formalisation of apartheid education and the removal of Church control over Bantu education. The fourth period, between 1976 (which marked a turning point in South African education) and 1986, is particularly significant for private education. It signifies the contestation between the private education sector and the State which was partially resolved with the passing of the Private Schools Act 104 of 1986. The final period, between 1986 and 1994, looks briefly at new initiatives in the privatisation of education which represent a transition from separate education to non-racial, democratic education. For the sake of convenience, the discussion is also organised according to the four provinces, namely the Cape, Natal, Transvaal and Orange Free State, which constituted South Africa up until 1994 when South Africa was restructured into nine provinces.

## 2.2.1 Private education before 1910

The development of private school education in South Africa has a long and complex history. In this section some of the most important developments in private education leading up to 1910, when South Africa became a Union, are discussed in the light of significant legislation.

### 2.2.1.1 Cape Colony

European settlement began at the Cape in 1652. Initially, education provision for the settlers was on a very small scale and mainly private. As in many other countries, private schools were the first schools to be established in South Africa and existed long before public schools. According to Malherbe (1925:24), education in the early days was haphazard and the nomadic life of people prevented the establishment of permanent schools. Parents, or groups of parents, were responsible for hiring a schoolmaster who travelled around with the community providing tuition. Home instruction was therefore commonplace. Education was thus a private and local affair.

Most of the formal private schools that came into being were established by missionaries and other church groups. The Dutch Reformed Church, in particular, played a dominant role in providing schools.<sup>1</sup> These schools were established with religious education and Christianisation as their primary tasks. Dutch pioneers had a duty to ensure their children qualified for membership of the Dutch Reformed Church. This required a measure of literacy and a degree of education. This included the ability to read the Bible and recite the catechism or articles of faith (Behr 1984:4). Other small private schools were established by farmers to cater for children from surrounding farm homesteads. Initially most of the schools were established in Cape Town but as settlers moved into the hinterland, the need for schools in outlying districts increased. Two types of teachers were employed to fulfil this task; the *sieckenstrooster*, a Dutch Reformed sick-comforter,<sup>2</sup> sent out from Holland to minister to the sick and prepare the youth for confirmation, and the itinerant schoolmaster who earned a living by moving from farm to farm teaching the rudiments of learning (Randall 1980:117).

During this time, there was no formal control over education and there were no formal education regulations. Although teachers were required to obtain a licence from the landdrost (magistrate), there was little in the way of supervision. At this time education control was vested in the Ecclesiastical Court which had been established in 1665. It was responsible for examining applicants for teaching posts, determining the suitability of teachers and supervising and examining schools. It also had the power to close schools if it was not satisfied with the type of education that was being provided.

As the population at the Cape expanded and the need for better education increased, more attention was given to the development of education policy. The first real attempt at proper education legislation was the education ordinance that was drafted by Chavonnes, a Dutch governor of the Cape. The Education Ordinance of 1714, was a codification of the current educational practices concerning religious teaching and observances, behaviour of children in and out of school, separation of sexes in school and church, school fees and the number of school holidays (Malherbe 1925:35; Rose & Tunmer 1975:85). The 1714 Ordinance introduced a new element of school administration through the establishment of a body of Scholarchs who were charged with supervising education. This body was an *ad hoc* Board of Education. The Chavonnes Education Ordinance of 1714 served as the main source of education legislation until the arrival of Commissioner JA De Mist in 1803.

De Mist was appointed Commissioner during the Batavian Republic (1803-1806). During his brief time at the Cape, he spearheaded one of the most significant education developments ever to take place at the Cape and he drafted one of the most advanced pieces of education legislation. On his arrival at the Cape, De Mist took an extensive tour of the colony in order to assess the education situation. He was concerned about the poor state of education, the lack of educational facilities and the uncoordinated nature of education control and provision, and so he set about establishing an extensive system of secular education in the liberal tradition.<sup>3</sup> To this end, he promulgated the Education Ordinance of 1805, which aimed at coordinating education and providing uniform educational facilities in Cape Town and the environs. The Education Ordinance of 1805 placed the control of the school system in the hands of a Committee of

Scholarchs. The Committee consisted of a member of the council of policy nominated by the Governor, the president, two clergymen of the Reformed Church, one from the Lutheran Church and another member nominated by the Governor. One of the consequences of the ordinance was that it placed education under the control of the state and the direct influence of the church was reduced. The Ordinance dealt extensively with the nature of teachers to be appointed, the curriculum, medium of instruction, the separation of the sexes, teachers' salaries and school fees. De Mist's plans were not implemented, however, and the ordinance was short lived with the re-occupation of the Cape by the British in 1806. However, in spite of this, De Mist's education ordinance is noted here because it represents one of the most significant contributions to the development of education theory and law in South Africa, and certainly influenced future education legislation.

The British occupation of the Cape in 1806 and the later arrival of the 1820 Settlers marked a new period in education at the Cape. The Cape colony was the first to implement a state-controlled education system when Lord Charles Somerset established free state schools in 1814.<sup>4</sup> Although Lord Somerset established a system of free state schools and a shift to state control, private schools flourished and the Church continued to play a central role in the provision and governance of education in spite of the growing public school sector. Somerset's policy of anglicisation was vigorously implemented after his arrival and had far-reaching effects on education and contributed to the development of private schools.

The policy of anglicisation, which was essentially aimed at creating a British culture, impacted on all areas of life, including education. For example, schools took on a greater British ethos and English became the official language. To facilitate the process of anglicisation in schools, teachers were recruited from Scotland to start up free English schools in the major centres. The traditional Latin school, which focused on the classics, was required to be conducted by a teacher who was a perfect master of the English language. In addition to the infusion of English in the schools, proclamations were made declaring that all official documents and court proceedings were to be in English (Rose & Tunmer 1975:97). As a result of the process of anglicisation, a number of private Dutch



schools were established with a view to preserving the Dutch language, religion and culture, and to rebuff British influence. The dichotomy between Dutch and English schools became well entrenched. This has remained a distinguishing feature of South African education throughout its subsequent development.

The arrival of the 1820 British Settlers also contributed to the development of English education and the process of anglicisation. Among the settlers were a large number of teachers, some of whom had attended private educational institutions in England and were eager to carry on the tradition in their new country. English private schools, initially aimed at educating the settlers' children, also grew in number. These schools were mainly established by church groups. One of the first schools to be established was WH Matthew at Salem in July 1820 (Randall 1982:56). The settlers were also responsible for establishing mission schools for African children. By the end of the 1820s the number of schools had grown and there was a need to establish a better system of education, organisation and control.

An important step in the area of education control was the establishment of a formal education department in 1839. Dr James Rose-Innes (1839-1859), a Scottish educationist, was appointed the first Superintendent-General of Education and entrusted with the task of setting up the education department. Under the direction of Rose-Innes non-sectarian schools were established. A system of grants-in-aid was also instituted which laid the foundation for a system of state-aided schools which numbered over 100 by 1862 compared with only nine fully-fledged state schools. One of the immediate effects of the new education dispensation was the increase in the State's control over missionary schools. Two important provisions made were that English was to be a subject but not necessarily the medium of instruction and religious education could be given provided that it was not denominational. Dutch children were therefore not compelled to receive instruction in English. The changes brought about did not prevent the growth of private schools. According to Malherbe (1925:68), between 1806 and 1839 the number of private schools increased, - most being Dutch schools. For example, the number of private schools increased from 39 in 1830 to 94 in 1839. Several of the private schools that were established still exist today. One of the most significant contributions to the establishment of private

schools in the Cape was made by Bishop George Grey, the first Anglican Bishop of the Cape of Good Hope. In 1848, he established St George's Grammar School in Grahamstown which is the oldest surviving private school. Grey is credited with establishing a large number of schools and regarded as the founder of the system of Anglican schools in South Africa (Randall 1982:63-65).

Between the 1830s and 1860s education law did not change dramatically. In 1865, the Education Act 13 of 1865 was promulgated and remained the most important education Act in the Cape until 1905 when the School Board Act of 1905 was enacted. The 1865 Act was to form the basis for the education system for the next forty years. The Act extended state control over the establishment and management of schools. A central feature of the Act was that it reinforced a system of grants-in-aid to schools. The grants were intended to help improve schools, including private schools. However, the grants provided were dependent on the nature of the school. Mission schools, which were essentially private schools run by missionaries and church groups, and which accommodated the bulk of school-going children, received grants to be used for teachers' salaries only. The following conditions also applied:

- (1) Managers of public schools were to be approved by the governor of the Cape.
- (2) The medium of instruction in all first and second class schools was to be English.
- (3) Religious education was to be given for one hour per week, but parents would have the option of withdrawing their children during that time.
- (4) The government was authorised to inspect all schools.

The conditions, particularly subsection (2) pertaining to English as medium of instruction, caused some discontent as this discriminated against the Dutch language. The neglect of Dutch after 1865 gave rise to the establishment of several more Dutch private schools (Muller 1984:209-210).

The School Board Act of 1905 was to provide for the establishment of school boards and better management of education throughout the Cape of Good Hope. It dealt comprehensively with the formation and composition of school boards,

election procedures, membership, the powers and duties of the school board, compulsory education and parent involvement. In effect, the Act introduced a more formal system of local control and management of public and private schools. An important aspect of the Act was the introduction of compulsory education which could be fulfilled by attending either a public or private school.

#### 2.2.1.2 Natal Colony

During the early settlement of Natal there was very little in the way of formal education. The Voortrekkers who had left the Cape and travelled to the Natal colony carried on their traditions. Their educational ideas were embodied in legislation in 1838. The few schools that were established included a Dutch-medium primary school in Pietermaritzburg in 1839 and an English-medium Anglican elementary school in 1855 (Randall 1982:720). In 1858 the Lieutenant-Governor appointed a board of education to oversee education and inspect schools.

It was only in 1860 that a system of education was organised and implemented during RJ Mann's term of office as Superintendent of Education for Natal. Mann laid the foundations of a system of primary schools. He established three types of schools: state, state-aided and private, categories which still remain today. Education Act 15 of 1877 was promulgated to make better provision for primary education including private schools in Natal and Education Act 16 of 1877 was aimed at developing and maintaining secondary schools. These Acts were important milestones in the development of education in Natal. While the Acts dealt mainly with public schools, private schools were also addressed on the issue of grants-in-aid.

In terms of Act 15 of 1877, financial aid was made available to private primary schools which enabled them to continue and at the same time maintain their autonomy. The aid consisted of grants of money to be used for teacher salaries and equipment. The aid was provided under certain conditions, however. According to section 11:

The Council of Education shall have the power to give aid out of public funds to any primary schools established by private persons, or committees on the following conditions:

- (1) That the principal teacher in any such school shall be declared to be duly qualified to teach by the Inspector of Education;
- (2) That the school be at all times open to inspection;
- (3) That the rules and books of secular instruction be subject to the approval of the Council of Education;
- (4) That the school shall be conducted as a public elementary school B;<sup>5</sup>
- (5) That the school premises be sufficiently commodious, well lighted, drained, ventilated, and properly furnished;
- (6) That registers of admission, and withdrawal, daily attendance and progress, and accounts of income and expenditure, be accurately kept and duly audited;
- (7) That no child receive any religious instruction objected to by the parent or guardian of such child, or be present whilst any such instruction is given.

An interesting feature of this provision is that it includes reference to rules of instruction which were enforceable. For the most part, regulations dealt mainly with registration and health issues, with little or no control over instructional matters. Subarticle 7 had particular implications for private church schools who generally required compulsory participation in religious activities (see also section 5.6.4.3).

During the next few decades the number of private and public schools grew. Of the some 260 schools that existed in 1897 only fifteen were fully state schools; most of the schools were state-aided (Behr 1984:9). Private schools were established mainly by church groups over which the Superintendent of Education had no control. During the 1870s some of the most well-known private schools were established, including Hilton (1872); St Anne's Diocesan College (1877); Girls' College (1877), Girls' Collegiate (1878) and Michaelhouse was established in 1896 and Kearsney College in 1921 (Randall 1982:75). These schools were

developed along the lines of the traditional British public (ie, private) school system which is still evident in many of the existing private schools today.

The Anglo-Boer War (1899-1902) at the turn of the century severely disrupted both private and public schooling. Although, private schools in Natal benefited from the influx of refugee children from the Transvaal, many private schools were closed. Behr (1984:11) also notes that all schools north of Colenso were abandoned during the war while some were used as military hospitals. After the war, ten to twenty Christian National schools were established to preserve the Dutch language and religion. These schools were similar to those Christian National schools established in the Cape.

#### 2.2.1.3 Transvaal

The development and nature of private schooling in the Transvaal is very complex. A variety of private schools existed by the 1890s and it was estimated that only about 8% of the total number of school-going children were attending state schools (Behr 1984:12).

Regulations promulgated in 1852 were regarded as the first attempt in the Transvaal to formulate an education policy. Education was placed in the hands of the Church and teachers had to be members of the Dutch Reformed Church. However, some significant developments which occurred in the Transvaal, and which had some influence on the private school system, were the annexation of the colony by the British in 1877, the implementation of the Education Act 1 of 1882 known as the Du Toit Act,<sup>6</sup> the establishment of the Witwatersrand Council of Education in 1885 and the promulgation of the Education Act 8 of 1892.

Although the British annexation of the Transvaal was short-lived, the effect on education was notable. An anti-British sentiment gave rise to a new education law, the Education Act 1 of 1882, based on the educational principles of Reverend J du Toit, Superintendent of Education. Education was to be the responsibility of parents and not the State, and it was to be based on purist Christian principles. Religion was the primary aspect of teaching and the Church once again became the controlling force in education. In addition to this, Dutch was the only medium of instruction. Education Act 1 of 1882 benefited private

schools to some extent because it once again placed the responsibility of education in the hands of the parents, and the State's role was restricted to providing finance.

By 1891, circumstances in the Transvaal had changed quite considerably, mainly because of the influx of people to the goldfields. Growing concern about the influence of the British contributed to a new education enactment which was promulgated in 1892 by N. Mansveldt, a former teacher and professor of Dutch who became Superintendent of Education in 1891. The Education Act 8 of 1892 continued to uphold the principles regarding the central role of parents. The government recognised the primary duty of parents to educate their children and provided for a system of supervision to ensure that pupils received the necessary Protestant education (Behr 1984:13; Muller 1984:276).<sup>7</sup> However, the Act underlined the State's intention to promote and advance education for the Dutch. The Act focused on protecting the language of the Dutch people. To this end, financial aid was cut off from schools that did not use Dutch as the medium of instruction.

This obviously had a negative effect on English-medium private schools and created further tension and division between the Dutch and the British. The 'uitlanders' (immigrants), who by this time were growing in numbers, and were predominantly British, rejected the Education Act of 1892 and its principles. In reaction to this, the Witwatersrand Council of Education was established in 1895 by leaders from the professional and financial community with a view to establishing English private schools and supporting existing ones. By the mid-1890s there were some 2 000 English-speaking children attending private schools (Randall 1982:97). According to Malherbe (1925:295), during the years 1895 and 1898 excellent work was being done by a few private schools in the towns of Johannesburg and Pretoria. Some of the schools were well equipped with gymnasiums and apparatus which would have compared favourably with the best of European schools. Much was done to attract pupils by means of athletics, sports and other extramural activities. Courses were also offered in music and painting. These schools had a very beneficial influence on the work of the neighbouring state schools, whose curriculum tended to be very bookish and

were thus coming under increasing pressure to improve the nature of education being offered.

As in Natal and the Orange Free State, the Anglo-Boer War had a significant effect on private schools in the Transvaal. In terms of a Resolution in 1899 all state schools had to be closed and all subsidised schools were required to close unless the staff at such schools were not required for the service of the country and the parents wished the schools to continue operating. Thus during the war years the Republic's education system virtually ceased to function. However, a few schools did remain open, and according to Randall (1980:192), some schools for the Dutch children were established privately by local inhabitants in non-combat areas with funds obtained from Holland. By the end of 1902 there were 17 such schools accommodating about 300 children. After the war, education was dominated by language and religious issues and this was reflected in various education legislation that followed. Tensions over the religious and language differences between the Dutch and the English intensified. Milner's policy of anglicisation drew resistance from leaders of the Dutch Reformed Church. During this period, a number of significant pieces of education legislation were passed which affected private schools for some time to come. The Education Ordinance (of the Transvaal) 7 of 1903, for example, was a particularly significant piece of legislation. It provided another means of extending state control in the private school sector. In terms of private schools, section 7 of the Act required private schools to be registered and to conform to all health regulations. Private schools were also subject to regular inspection. These provisions were not unreasonable, however, and did not create any problems. The Act did, however, indicate a shift in favour of English, which once again caused concern among the Dutch population. The clause at the heart of the problem was section 5 which stated that:

Any scholar shall at the request of his or her guardian receive instruction in the Dutch language for three hours a week. The instruction may be additional to instruction in Bible history and religious instruction given in the Dutch language, provided that the total time devoted to instruction given under this section and the last preceding section shall not exceed five hours a week.

In reaction to this provision on language, which further underscored the ideological differences between Milner and the Dutch, the Christian National Schools Movement was revived and private Dutch schools organised by the Dutch Reformed Church and based upon Calvinistic theology flourished. These schools, known as Christian National Education schools (CNE), were similar to those that had been established at the Cape and Natal. They were the counterparts of the English private schools run by the Witwatersrand Council of Education. They were also partly influenced by the philosophy behind the education Acts introduced by Du Toit and Mansveldt in the later part of the 19th century. These schools sought to protect the Dutch language and religion which had clearly not been given equal treatment with English in the Ordinance of 1903.

The issue of language and religion was thus still an important factor in the Education Act 25 of 1907 (Smuts Act).<sup>8</sup> A primary function of this Act was an attempt to appease the Dutch who were aggrieved at the unequal status of English and Dutch that was established in the Education Ordinance of 1903. It gave effect to and consolidated certain issues, particularly those of language and religion. It also represents a compromise between the ideals of the old Transvaal regime and those of the new system that developed after the Anglo-Boer War. Central to the Education Act of 1907 was the provision on religious instruction. This was to be given in English or Dutch and remained a compulsory part of the curriculum.

Section 35 (1) of the Act also set out fairly detailed provisions for the registration of private schools. In brief, the proprietor of a private school was required:

- (a) to register the school at the office of the department
- (b) to keep a register of enrolments and daily attendance of pupils
- (c) to keep a register of teachers employed and their qualifications.

Private schools were also subject to inspection. The emphasis of inspection was placed on sanitation and health. Schools that were unsuitable or that failed to fulfil the prescribed requirements faced closure and proprietors were liable for a fine or imprisonment. Section 36 (1) of the Act provided that:



the Director or any inspector of education specially authorised thereto by him from time to time visit any school as is in this chapter described and if from information obtained on such visit or otherwise it appeared to him that such school is conducted in a manner which is calculated to be detrimental to the physical, mental or moral welfare of the pupils attending thereat the Director may if he deem it necessary cause an inspection of such school to be made by a medical practitioner nominated by the Medical Officer of Health for the Colony.

Provision was also made for the payment of grants not exceeding half the expenditure on the salaries of the teaching staff provided that:

- (a) such grants are not made on behalf of private adventure schools, that is of schools conducted for monetary profit
- (b) the committee or governing body of such schools shall submit a statement of accounts when called upon by the Director so to do
- (c) instruction is given in such school in a room or rooms suitably situated, constructed and equipped and that the premises generally are approved by the Director
- (d) the curriculum followed is approved by the Director
- (e) such school is open to medical inspection by a person authorised therefor by the Director
- (f) a satisfactory report on the instruction given and the conditions under which the same is given has been made by an inspector of education
- (g) such grants may be reduced or withdrawn on the receipt of an unfavourable report from an inspector of education by the Director.

Thus by the time of the Union, the State was already beginning to exercise wide control over private schools in the Transvaal. Similar provisions continued to appear in subsequent legislation including the Private Schools Act 104 of 1986.

#### 2.2.1.4 Orange Free State

The position on private schools in the Orange Free State (OFS) was quite different to that of the other colonies. There were very few private schools and

because there were few English people in the OFS there was little need for English private schools. For the most part, education was limited and haphazard.

In 1854, a Constitution for the Orange Free State (OFS) was passed which included a provision concerning education. Articles 23 and 24 provided that 'the furtherance of religion and education shall be subject for the care of the Volksraad' and 'the Dutch Reformed Church shall be provided for and supported by the Volksraad'. The Constitution thus provided a legal basis for the governance and provision of education, and sanctioned the central role of the Dutch Reformed Church. The first school law followed a decade later in 1863. This law dealt with local control of schools, finance, inspection, examinations and courses of study. However, it was only in 1874, after the arrival of Reverend Brebner that serious efforts were made to develop a better system of education and implement legislation (Malherbe 1925:264-267).

Reverend Brebner was appointed Chief Inspector of Education in 1873. When he surveyed the condition of education in the Orange Free State, he found that it was meagre and unorganised. He discovered a few private schools that were generally of poor quality and staffed by untrained staff. There was an urgent need for a new education system and legislation to provide for the necessary finance. As a result the Education Ordinance 1 of 1874 was promulgated, which formed the basis of future legislation. According to the Ordinance, the Volksraad (legislative assembly), under whose control education (including private schools) was placed, was authorised to vote a sum of money for education development. The inspector responsible for educational matters was required to report annually to the Volksraad. The finances included providing grants-in-aid to schools (Malherbe 1925:371).

With regard to private schools, the 1874 Ordinance included the following provision: Subsection (e) provided that private schools could apply for government aid under certain conditions. Schools were required to be situated on a farm not too near a government school, they had to be examined and reported on by some person appointed by the superintendent of education, and regular instruction according to the prescribed standards were to be given for at least six months prior to the examination. In addition to this, a teacher had to 'be

of a good character, and be a member of the Protestant Church'. This obviously placed Catholic and Anglican schools, who were more likely to appoint teachers of the Catholic and Anglican faith, at a disadvantage.

From 1877 to 1898 state and private schools grew in number. In 1874 there were 10 state schools in the whole of the Orange Free State compared with 199 in 1898, which enrolled some 8 157 pupils. There were also 42 private schools with 753 pupils. The development of education, however, was soon to be affected with the outbreak of the Anglo-Boer War (1899-1902) which saw the collapse of the education system. Following the Anglo-Boer War and the establishment of responsible government in the Orange Free State, new education legislation was passed. The Education Act of 1908 (Hertzog's Act) was one of the most comprehensive pieces of legislation to date. Key features of the Act included the following:

- (a) the reintroduction of school fees
- (b) equal treatment of English and Dutch
- (c) Bible History up to Standard VI

Although the Act reinforced the State's control over education, private schools continued to operate and grow. They were also entitled to apply for government grants.

#### 2.2.1.5 Summary

In the preceding section, a brief overview was given of some of the major legal developments in education from the mid 1660s to 1910. During the early colonisation of the four colonies, education was initially provided through private initiatives. Churches and religious groups played a very significant role in establishing, maintaining and supervising schools. Education was generally haphazard and irregular. As the need for more formal organised education grew, a system of State education was established throughout the country (Cape 1814; Natal 1860s; the Orange Free State 1870s and Transvaal 1880s). By the middle of the 19th century, each of the four colonies had some public education system in place. The two British colonies, Natal and the Cape, followed the British education system, while the Transvaal and the Free State, the two Boer

Republics, were largely influenced by the Dutch and German education systems. The state education provided during this period was mainly for the white population. African children attended missionary schools, although the vast majority had no access to any education. Strict segregationist policies were also followed, although the Cape and Natal adopted a more flexible approach to integration.

During this period education legislation was extensive but focused more on public schools than private schools. There was no specific legislation dealing solely with private education. Sections of legislation pertaining to private schools dealt mainly with registration requirements and health and sanitation laws. A notable development was the establishment of a system of grants-in-aid which was also available to private schools. The provision of grants-in-aid depended on certain conditions being met. Although private schools received state aid, they remained private and autonomous to a large extent and were distinguishable from public state-aided schools which remained under the governance and jurisdiction of the State and were thus less autonomous. However, the grants-in-aid were one way in which the State could widen its control over the development of private schools.

This period of education development was also characterised by the growing tension between the English and the Dutch, which contributed to the growth of private English and Dutch schools. The competition and conflict between the Dutch and the British in the education sphere focused mainly on the key issues of language and religion, as was reflected in the education legislation.

### **2.2.2 Private education between 1910 and 1945**

By the time of the Union, a well-established system of private schools existed throughout the country. The South African Act of 1909, passed by the British parliament, brought the four South African self-governing colonies (now provinces) under a single central government.<sup>9</sup> During this period there was a significant shift in the sphere of state control and influence. Control over primary and secondary education was placed under the provinces. This resulted in each of the provinces developing its own education policy, which accounts for the differences in the nature of education in the provinces today. During this period,

legislation on education in the four provinces grew in number and reflected the changing nature of education.

#### 2.2.2.1 Private schools

The increase in state control over education was seen as a threat to private schools. Private schools, which were scattered throughout the country, were loosely associated and did not present a unified system. However, with the rapidly changing political and social circumstances in the country it was becoming necessary for private schools to present a united front. This was particularly important in light of increasing state control over education and a growing, competitive public school system which posed many challenges and possible threats to private schools. Efforts to consolidate English private school interests were also important in the face of growing Afrikaner nationalism and the strengthening of Christian National Education which were to have a profound influence on private schools. The tension between the private school and public school sector became more evident. The private school sector, which was increasingly viewed by the government as a threat to public schools, worked to maintain their position and resist the influences of Afrikaner nationalism. As state control over education increased and Afrikaner nationalism took hold, it was inevitable that the number of Afrikaans private schools was to decline and English private schools increase. Therefore, it was in the best interest of the disparate private school community to become consolidated. A major development to this end was the founding of the Conference of Headmasters and Headmistresses (HMC) which was based on the British HMC.<sup>10</sup> The establishment of the HMC was the first major step in bringing private schools closer together and to provide a means of addressing shared interests and concerns. The first meeting of the HMC was held at St Andrew's School in Bloemfontein on 17 December 1929. The aim of the HMC as set out in its first Constitution was to 'forward the aims of all Diocesan church schools and private schools for Europeans in South Africa' (HMC Report 1929:8). At the HMC meeting in 1936, the Constitution was amended to read as follows: 'the aim of the Conference is to forward the welfare and interests of schools represented' (Sutcliffe 1986:9). This indicated the HMC efforts to become more inclusive and to foster greater cooperation between private schools in a more organised and

formal way with a view to promoting the private school sector as an organised and cohesive system.

During the 1940s, concern among private schools over the State's control over education was given further impetus by legislation which had an impact on private schools particularly in Natal and the Transvaal. The language issue, a long-standing controversial issue, continued to dominate the education debate. The Natal Education Ordinance 23 of 1942, was passed to consolidate and amend the laws relating to education in the Province of Natal. This Ordinance confirmed the right of the parents to choose the medium of instruction for their children. However, the study of both official languages from Standard 1 upwards, and of one other subject in the medium of the second language from Standard 2 upwards was made obligatory. In Natal, growing concern among private schools over this issue contributed to the formation of the Private Schools' Association of Natal in 1945.<sup>11</sup> Initially the Association represented ten Natal private schools. One of the aims of the Association was to 'examine existing proposed legislation and to make representations to the appropriate authorities' (Sutcliffe 1986:29).

In the Transvaal, the Transvaal Education Ordinance 5 of 1945 was passed to consolidate and amend the law relating to education in respect of language. In terms of section 5(1) the medium of instruction was to be the home language. This provision applied to public and private schools. Moreover, section 4(1) required that English and Afrikaans, the two official languages, should be taught as examination subjects to every pupil above the fifth standard. This provision also applied to public and private schools. The notion of becoming bilingual was accepted by most people, but private schools were dissatisfied with the fact that these regulations were imposed on them by the State which was viewed as an infringement on the freedom of education. Besides this, there was also the practical problem of finding teachers to teach Afrikaans in private schools. In reaction to this Act the Headmasters Conference stated that it was 'in favour of making all boys and girls in our schools bilingual but was of the opinion that not only is external compulsion unnecessary to achieve bilingualism, but that it would be detrimental to the declared policy of the government in its efforts to encourage racial unity and mutual understanding' (Sutcliffe 1986:28-29).

In the Orange Free State, there were few private schools and therefore less attention on them. The Education Ordinance 15 of 1930 maintained parental choice in education. It thus recognised private schools but it prescribed regulations on the number of students (a private schools had to have at least five students), the registration of private schools, inspection and the maintenance of registers for students and staff. Moreover, although section 49(1) provided for home language as medium of instruction up to Standard 6, above that standard parents could choose the medium of instruction. Parents could also choose if they wanted their children to learn English or Afrikaans as a second language.

#### **2.2.2.2 Summary**

The period 1910 to 1945 saw an increase in state control over education, which impacted on private schools. The provisions on private schools for all four provinces were very similar and remained fairly constant. These included the duty of the principal/proprietor to register the school; to keep records of pupil enrolments and attendance, and of teachers' names and qualifications. Schools had to satisfy certain conditions concerning the premises, equipment and certification. However, in Natal and the Transvaal legislation forcing private schools to teach both English and Afrikaans as examination subjects caused some concern and was viewed by the private sector as an infringement on their autonomy.

#### **2.2.3 Private education during the apartheid era from 1945 to 1976**

By 1945, the State had established a monopoly over education which was to intensify with the election of the National Party in 1948. During this period, the National Party positioned itself as the primary agent of education and custodian of nationalist values. A primary aim of the State was to pursue its goals through the control and expansion of public education. Needless to say, relations between the private school sector and the State were less than cordial. During the period of National Party rule, interest in private education grew and many church-affiliated private schools were established (Muller 1992:340). However, the relationship between the private school sector and the State continued to be characterised by strain and conflict. The relationship is aptly summed up by Muller (1992:343), who states that 'the National Party did its best by and large to

ignore the white private schools and the white private schools equally did their best to ignore the government'.

Issues that dominated education and which had a major impact on private schools during the first few decades of National Party rule, included the issues of race, of Afrikaner nationalism and religion, and language.<sup>12</sup>

#### 2.2.3.1 The issue of race and the impact of racially-based legislation on private schools

The basis for race classification was the Population Registration Act 30 of 1950. This Act segregated the population into four race groups (white coloured, African and Asian). This prohibited private schools from admitting pupils of different race groups. The Bantu Consolidation Act 25 of 1945 and the Group Areas Act 36 of 1966, which confined groups of people to living in certain areas, also made it illegal for white private schools to admit non-white children. Section 9 of the Bantu Consolidation Act, for example, forbade the admission of African pupils to any school outside the 'location'.

The Bantu Education Act 47 of 1953, one of the most pernicious pieces of education legislation, brought an end to the long era of missionary education for African education. The main purpose of this Act was to establish state control over African education and to develop a separate system which would advance the policy of apartheid. The State actively discouraged and effectively prohibited private education institutions from being established and insisted that such schools could only be established and administered subject to the control of the State. To this end, the Bantu Education Act also ended state subsidies to private religious schools. According to Christie (1990b:183), unlike most other religious denominations, the Catholic Church decided to retain its schools at the cost of receiving no subsidy. This decision inevitably led to a decline in the quality of some schools and also widened the gap between white and black educational provision.

The Education Policy Act 39 of 1967 provided the framework for segregated education. It firmly established separate schools and prohibited racial integration. This Act also made clear reference to the 'Christian' and 'National' character that



was to permeate South African education for the next several decades.<sup>13</sup> From 1983 onwards, separate education was further entrenched by the Constitution of the Republic of South Africa Act 110 of 1983 which created own affairs and general affairs.<sup>14</sup> Education was classified as an own affair. This led to further diversity in all areas of education. Up until 1994 the education system comprised 19 education departments: a national department of education, one central department for each of the four population groups and ten departments of self-governing territories and homelands, and four provincial departments. Each department was responsible for a complex education sub-system with its concomitant legislation. Educational inequalities resulting from this structure are well documented and need no further discussion.<sup>15</sup> Although the private school sector was opposed to legislation that forced separate education and vociferously opposed apartheid education, it was only after 1976 that concerted action was taken by religious groups to advance non-racial education and to implement an open door policy (see section 2.2.4).

#### 2.2.3.2 The impact of Afrikaner Nationalism and Christian National Education on private schools

Throughout South African history tension between Dutch- (later Afrikaans) and English-speaking communities has been evident in the field of education. This tension has also manifested itself in the growth of private schools. During this period, the growth of Afrikaner nationalism continued to impact on private schools. According to Sutcliffe (1986:25-26), in spite of the cooperation between English-speaking and Afrikaans-speaking South Africans during the Second World War, a hard core of Afrikaner Nationalists saw the war as an opportunity to rid South Africa of the British connection. Anti-British and pro-German organisations, such as the Ossewa Brandwag and Grey Shirts, were fashioned on the Nazi model. This growing Afrikaner Nationalism was thus cause for concern. During the 1950s and 1960s, the HMC affiliated schools became increasingly concerned about the possibility of totalitarian legislation in education (Sutcliffe 1986:26).

Sutcliffe (1986:26) observes that 'as the idea developed that the State should extend its educational responsibilities, a corollary was added that the State should assume responsibility for the control and planning of all education, and

that schools other than those managed by the State were undesirable'. This idea became more evident during the 1950s with the emergence of education legislation that was viewed as a threat to private schools, and which heightened the growing tensions between the State and the private school sector.

The publication of the Policy of Christian National Education in 1948 gave rise to further concern for the future of private schools. The Beleid (policy) had its origins in a Conference in Bloemfontein in 1939 which was called by the Federasie van Afrikaanse Kultuurverenigings (FAK) (Federations of Afrikaans Cultural Associations). The FAK appointed a committee to draft a proposal setting out the principles of Christian National Education,<sup>16</sup> which were to form the basis of all subsequent education legislation.

The private school sector received this document with great circumspection. In a memorandum prepared by Currey and Snell (headmasters of prominent private schools) at the request of the Standing Committee of the Association of Church Schools of South Africa in June 1949, the authors provided an insightful comment and critique of the Beleid. Their concern for its effect on private schools is summed up in the following statement:

Nowhere in the Beleid is any reference made to private schools. This may seem that in the view of the ICON (Institute of Christian National Education), private schools are so unimportant a part of the education system of the Union as not to require notice or mention. It may mean that in its view such schools can find no useful place in a compulsory Union-wide system of CNE. The whole attitude set forth in the Beleid is something extremely alien to that freedom for which the private schools stand, and without which they cannot live (Currey & Snell 1949).

Although the Beleid stressed Christian education and the role of the church, Smurthwaite (1981:61) argues that the philosophical basis of Christian private education in South Africa is fundamentally different from Christianity envisaged by the State. Thus the central role of religion in education was not disputed, but rather the nature of religion and how it was to be used by the State as a means of promoting one kind of education and one dominant religion. Although both are 'Christian', Smurthwaite describes the former as a 'universal, transcendent

Christianity' which requires that education should be a 'synthesis of culture and faith', while the latter 'is drawn into the narrows of patriotism and the glorification of the State'. According to MacMillan (1962:330), the term 'Christian' in the context of Christian National Education meant a nation based on 'the Holy Scripture and expressed in the Articles of Faith of the three Afrikaans churches' and 'National' meant 'the love of everything that is our own'. These aims were to be realised through the control of schools. Thus, according to Behr (1988:98):

The exponents of Christian National Education believe that God ordained that there should be an Afrikaner nation with a land and language of its own and a religion based on orthodox Protestant-Calvinistic principles ... 'National' is seen as love for one's own culture and heritage. Christian and national go hand in hand, and the school is at the heart of national life.

This philosophy gave rise to a particular kind of education which became synonymous with apartheid education. The divisive and prescriptive nature of education, the emphasis on the State being the predominant custodian of education and the superiority attached to the Afrikaner nation, were in direct contrast to the philosophical underpinnings of English-speaking private schools, which placed more emphasis on individual freedom, autonomy and religious diversity.

#### 2.2.3.3 The role of language and private schools

Schools are important institutions for the transmission of culture, language and religion, so it is inevitable that language and religion played a dominant role in the development of education in South Africa and was reflected in successive pieces of legislation. The language and religious issue was also not separate from the financial situation since grants-in-aids were variously linked to requirements concerning the medium of instruction and religious education. During the apartheid era, language and religious issues continued to play a central role in the education debate, and were largely responsible for the growing rift between the private school sector and the State. Legislation that was implemented by the Nationalist government had a significant impact on private schools.

The animosity between the State and the private schooling sector was particularly evident in the Transvaal, which by now had the largest number of private schools. The first piece of legislation of significance was the Transvaal Ordinance 5 of 1945 which was designed to bring about dual medium of instruction in a 'bilingual country' (the multi-lingual nature of the country was ignored). All students were required to learn both official languages (English & Afrikaans), with the gradual introduction of the second language until both were used more or less equally as media of instruction. This was followed by the Transvaal Ordinance 19 of 1949, which provided for the consolidation and amendment of the law relating to the question of language, enforced the principle of separate schools and mother tongue instruction. Section 4 provided that the medium of instruction of every pupil in all standards up to and including the eighth standard of any school shall be the home language of the student. In terms of the Ordinance, the principal of the first school at which a child enrolled was required to determine which of the two languages would be regarded as the home language. If pupils were equally proficient in both languages, the matter was referred to the Director of Education, who then required the parents to make a decision in writing about the choice of home language. If parents failed to meet the requirement the director made the choice. School principals were obliged to uphold the Act and any person who contravened the Act was guilty of an offence and legally liable. The extent to which this was enforced by the government is noted by Randall (1982:186) who reports that the Transvaal Education Department threatened to prosecute private schools that admitted Afrikaans pupils and in 1951, 665 cases were referred to the Director of Education to establish officially the home language of the children involved. Although the Ordinance applied specifically to state schools, it was also made to apply to private schools, which became a contentious issue and the subject of two court cases.

The matter was dealt with in the cases of *Swart, N.O and Nicol, N.O v De Kock* and *Swart, N.O, and Nicol, N.O. v Garner and Others*.<sup>17</sup> The two appeals concerned a declaratory order made by the Transvaal Provincial Division of the Supreme Court to the effect that Ordinance 19 of 1949 was *ultra vires* (beyond authority) in so far as it applied to private schools.

In the first case of *Swart, N.O and Nicol, N.O v Garner and Others*, a private school (operating as a Catholic convent) had been informed by the Department of Education that it had contravened section 4 of the 1949 Ordinance by allowing an Afrikaans pupil to learn through the medium of English. The respondents, the Catholic Bishop and Vicar Apostolic of Pretoria who administered all Catholic schools and the Mother Superior and Principal of Loreto Convent a private school in Pretoria, and the father of the pupil, claimed the following orders against the Minister of Justice and the Administrator of the Transvaal:

- (a) Declaring the Education Act Amendment Ord. 19 of 1949 to be *ultra vires* (of the law) and of no force and effect.
- (b) Declaring that it is lawful for the first and second petitioners to educate any child whose home language is either Afrikaans or neither Afrikaans or English at the Loreto Convent or at any other Catholic School under the jurisdiction of the first petitioner through the medium of English.

In the second case the respondent was the father of the pupil. The first order claimed by the respondent was the same as the first claim made by the respondents in the first case. The father claimed an order:

Declaring that it shall be lawful for the said pupil, or for any other child whose home language is Afrikaans to be educated through the medium of English at any private or public school in the Transvaal.

After considering all the arguments the court declared the Ordinance 19 of 1949, which compels the home language as medium of instruction, not to be *ultra vires* and dismissed the claims made by the respondents. The decision of the Transvaal Provincial Division was reversed.

There was much criticism of the Transvaal Ordinance of 1949 by the HMC. In an opening address to the Conference in 1950, the Right Reverend GH Clayton sounded a warning over the State's growing control over education and the precarious position of private schools in the light of the 'ideological background of what is envisaged as South Africa of the future [which is] Calvinistic'. Clayton cautioned that:

The private schools of the country are among the institutions which stand in the way of the realisation of this idea. Those who have the Nationalist outlook have no need for private schools. They can get all they want in government schools at government expense. The private schools are strongholds of English culture, where the English language is dominant, where there is good deal of diluted liberalism taught, or else they are strongholds of Catholicism, where ideology is certainly not Calvinistic. There is no place for them in the future as envisaged by our present rulers (HMC 1950:4).

The Language Amendment Ordinance of 1952 also had a significant effect on private schools. The Act extended the control of the State over private schools and reaffirmed the decision regarding home language as medium of instruction. It was viewed as an infringement on the independence of private schools by laying down that schools had to be single medium; it restricted the power of private schools and Afrikaans pupils had to be excluded from English-medium private schools.

In addition to this legislation, the Transvaal Consolidation Amendment Ordinance 29 of 1953 also created cause for concern amongst the private schools. The Ordinance allowed for the existence of private schools but placed them under the control of the Director of Education, who had been given wide powers to close private schools which did not meet with approval or refuse permission for new private schools to be established. Grants to schools were to be frozen at the existing amount and no new grants were to be provided. The private sector viewed this as a means of discouraging private education in the Transvaal.

The concern expressed for the position of private schools and their freedom was not without substance. At the HMC Conference of 1954, Feetham, in his opening address, quoted Dr Wassenaar, a member of the Executive Committee of the Provincial Council who took a leading part in the Transvaal Education Ordinance (1953), as saying the following:

I think it was made quite clear yesterday that, in our opinion [that is of the Executive Committee], private schools really have no longer the right to exist (sic). The State today provides facilities in all branches of knowledge.

Originally our schools were entirely in private hands, but so were all other kinds of private enterprise. ... But it has gradually come to be felt that these are all activities which ought to be in the hands of the State. And so education has gradually come under State control. Today the State provides all the necessary facilities for the education of our children. Private schools are a relic from earlier times when different conditions prevailed. ...

We regard the government school as the proper school. It gives everything to the child which can possibly be given and no necessity any longer exists to call a private school into existence for special reasons (HMC 1954:6).

The Transvaal Ordinance of 1953 and Wassenaar's views clearly illustrate the State's attitude toward private schools and its intent to have a monopoly over education for the sake of uniformity in administration. This signalled a warning to the private school sector that the State would not easily tolerate the existence of private schools. By gaining a monopoly over education, the State placed itself in a powerful position to control and direct education to advance the social, economic and political goals of apartheid.

#### 2.2.3.4 Summary

The period leading up to 1976 saw the passing of a number of pieces of legislation which entrenched separate education and ensured that Christian National Education would remain the dominant philosophy and basis for all teaching and learning in South Africa. This brought the State into conflict with the private school sector, who viewed the State's increasing control over private and public education as a threat to their independent existence and freedom to conduct their affairs according to their own educational beliefs and philosophy. However, in spite of efforts by the State to undermine the private sector and discourage new private schools, student enrolments at private schools in the four provinces were not dramatically affected. This is evident from the numbers given in the following table, which is an estimate of the number of private schools and private school students between 1951 and 1972.

**Table 2.1 White students in private primary and secondary schools (1951-1972)**

Year	CAPE	NATAL	TVL	OFS	TOTAL
1951	15 171	4 097	19 055	344	38 667
1960	17 712	3 954	23 839	1 385	46 890
1970	17 324	1 436	27 898	511	47 169
1971	16 795	1 326	28 551	491	47 163
1972	15 603	2 343	27 865	116	45 927

Source: SA Statistics (1951-1972)

#### **2.2.4 The open schools movement from 1976 to 1986**

The open schools movement, which is regarded as a significant reform movement in education, gained momentum during the late 1970s and the 1980s and had a significant influence on educational policy during this period.<sup>18</sup> Between 1976 and 1986, religious private schools actively challenged the State's position on segregated education and the conflict between the State and the private school sector deepened over the issue of racially integrated schooling. The Catholic Church, in particular, and the HMC played a significant role in the desegregation of private schools. In the section that follows, an overview of some of the main developments in the open schools movement are highlighted.

##### **2.2.4.1 The Church, the State and segregation**

Up until 1976 private schools were predominantly white and church-affiliated with the largest body of private schools being Catholic. Although religious groups were initially slow to take a firm stand against apartheid education, condemnations of apartheid education and race discrimination were being made. For instance, the South African Catholic Bishops' Conference (SACBC) condemned apartheid as 'intrinsically evil' in 1952 in its Statement on Race Relations and again in 1957 in a pastoral letter. However, although much was being articulated on the evils of apartheid and apartheid education, little action had been taken to challenge existing laws and structures. This was even



acknowledged by the Bishops' Conference. For example, in 1957 the SACBC commented that:

The practice of segregation, though officially not recognised in our churches, characterises nevertheless many of our church societies, our schools, seminaries, convents, hospitals and the social life of our people. In the light of Christ's teaching this cannot be tolerated forever. The time has come to pursue more vigorously the change of heart and practice that the law of Christ demands. We are hypocrites if we condemn apartheid in South African society and condone it in our own institutions (Christie 1990a:17).

During the 1950s and 1960s some Catholic schools had enrolled 'non-white' children. However, it was only in the 1970s that this message was truly acted upon. The Soweto students' riots of 1976 was a turning point in education and signalled a new phase in the struggle against apartheid and could not be ignored by the Catholic Church. Growing dissatisfaction with the status quo and following the 1976 riots, the Catholic Church, driven by moral and educational considerations, began to campaign more strongly for schools to become desegregated and to implement a non-racial, non-discriminatory admissions policy.

The Catholic Church's position on desegregated schooling had already been highlighted in a report in 1972 by Sister M Neal. This report served as an impetus for discussion on the opening of white schools to all race groups, and in 1976 the SACBC encouraged schools to promote the implementation of a non-racial policy (Corke 1984:33). In 1976 the SACBC passed a resolution on the 'Integration of schools' which read as follows:

Realising that the church must give witness to the Gospel in its institutions, the Conference favours a policy of integration in Catholic schools, encourages individual schools and associations of schools to promote the implementation of the policy according to circumstances, and directs that the (Catholic) Department of Schools continue to study the question with a view to enabling the Conference to confirm and concretise the policy (Christie 1990a:7).

By admitting pupils of all race groups, albeit in small numbers, the SACBC openly challenged the State and offered an alternative to the segregated state education system (Christie 1990b:180). In 1976, the HMC Conference, which represented a number of private Anglican and Methodist schools, also supported the notion of integrated schooling. In pursuit of open schooling the HMC requested the Association of Private Schools (APS) to take immediate and urgent steps to appoint a special commission to investigate from every possible angle the admission of all pupils irrespective of race to their schools (HMC 1976:13). In 1977 the HMC further resolved that:

this Conference ... declares itself in favour of the removal of all restrictions to the admission of pupils of different races to private schools in South Africa; the extensions of contact between pupils of different racial and cultural groups; and commits itself to strive for the just and equitable provision of education and opportunity for all South Africans (Randall 1982:192).

The desegregation of church schools within the Catholic Church, however, was not without its problems. There were differences of opinion within the Church with regard to the *process* of desegregating their schools and on the interpretation of 'open'. Some groups favoured a gradualist approach to desegregation while others sought a more vigorous and speedy approach. For example, in 1975 the Association of Women Religious (AWR) presented the following resolution to the National Council of Religious:

...the time has come for those Catholic Convent Schools which have hitherto accepted only white pupils to give practical Christian witness to Social Justice by accepting non-white Christians into their schools. We consider that the policy should be one of quiet infiltration with no sought-after publicity and that it should be adopted by all convent schools (Christie 1990a:20).

In this resolution, the AWR were proposing the admission of black children without approaching the State for permission. The idea was to do it quietly but extensively so that by the time the government took notice it was too late to do anything about it. This approach, however, was opposed by the Association of Teaching Brothers (ATB) which stated that it:

agreed unanimously that the Association was in favour of integrated education, as far as conformity with educational norms, involving as it does the admission of Black, Coloured and Asian children to our white schools. The Brothers should work towards this end in a manner which is within the laws of the country, at the same time taking all practical steps to have the laws amended (Christie 1990a:20).

Thus, while the Sisters set the opening of their school as a first priority, the Brothers decided to pursue a policy of opening their schools within the laws of the country (HMC 1976). The matter was referred to the SACBC who addressed the issue in their January 1976 Plenary Session. The SACBC made a policy statement in favour of complete integration. This received far-reaching support.

The issue of terminology was also hotly debated. The meanings of the terms 'integration' and 'open' needed clarity and this generated an interesting discourse. The SACBC had used the term 'integration' but this was not accepted by all. The Education Council of Associations of Religious (ECAR), for example, rejected the term 'integration' at its annual general meeting in June 1976:

The use of the word integration as a highly emotive word was discussed, and it was agreed that it should be dropped in this context. The teaching Congregations wished to establish and maintain schools that were 'open' to the People of God, irrespective of race as they are of creed. This openness implied no compulsion but simply availability. It was agreed to insist on this word in the future (Christie 1990a:24).

As a result of this debate, the word 'integration' was dropped and 'open schools' was used to describe the position of desegregated private schools. Clearly open schools were those white registered schools who exercised an open policy on race.

#### 2.2.4.2 Church-State contestation over desegregation

The adoption of an open policy brought the private schools into direct conflict with state policy on education. Although the State was endeavouring to initiate major change in various spheres of society, state reform on education did not extend to desegregation. State policy was clear regarding separate education on

racial lines. Therefore, initially the government was unwilling to accept open schools and initiate legislative reform. By 1977 there were approximately 220 black pupils attending white registered Catholic schools (Christie 1990b:184), a small number by all accounts. However, the State condemned these schools and questioned their legality. In 1977, prior to the general election, Pieter Koornhof, then Minister of National Education, agreed to allow existing black enrolments but no new enrolments would be permitted until a cabinet decision had been made on the matter. Following the general elections, the National Party stressed that the admission of black students was illegal and that schools could be required to apply for the admission of black students which would be considered under special circumstances. The legal status of open schools was, however, still uncertain.

Although the State insisted that non-racial (open) private schools were illegal, they were not automatically closed, although this remained a possibility. Private schools therefore continued to enrol black students but on a small scale. This also varied from one province to another. In the Transvaal, open schools were strongly opposed. The Transvaal administration was the least conciliatory and threatened to close open private schools. In 1978 Sybrand van Niekerk, the Administrator of the Transvaal, insisted that it was illegal for private schools to admit black students and stated that 'he ... regretted that the church (Catholic) had embarked upon the policy of open schools as he saw it being contrary to what was customary in the country and in the best interests of all' (Heilbuth 1992:84). He refused to accept the principle of desegregated schools. In spite of the concession made by the National Party, Van Niekerk refused to allow further admissions and during 1979 refused all but four of the 221 applications made by schools (Christie 1990b:187). He threatened to close schools by withdrawing their registration. The Cape administration was generally more conciliatory towards open schools. Of the 147 applicants made in the Cape, only 10 were refused (Christie 1990b:186). The Cape administration was more willing to consider applications and applied a more liberal interpretation of 'special circumstances'. In Natal, the administration also insisted that it had to approve all applications for black students and warned that the schools should refrain from increasing the number of black students. In the Orange Free State, the situation

was quite different. Schools were not permitted to enrol black students and private schools did not make any great attempt to do so.

#### 2.2.4.3 Period of reform

During the late 1970s and through the 1980s, the State embarked on a process of reform precipitated, *inter alia*, by the ever-increasing internal and external pressure on the government to end apartheid. According to Christie (1990a:8), the reform process may be viewed as an attempt to restructure the State in response to a crisis of power. The State was faced not only with a political crisis and the vexing problem of political illegitimacy, but growing social unrest and economic decline. This was evident by the recession, a high inflation rate, growing unemployment, ongoing labour unrest, a sagging gold price, which continued throughout the 1980s and which resulted in a major loss of foreign capital, stagnant economic growth rate, economic sanctions and the withdrawal of foreign capital (Claassen 1995:463). Moreover, by 1986 there was a virtual permanent state of emergency. The number of commissions appointed during this period is indicative of the thrust of the reform efforts. In the wake of these commissions, which included labour relations (Wiehahn), law (Rabie), manpower (Riekert) and education (De Lange), a number of reforms were introduced, such as the abolition of pass laws, the recognition of black trade unions and a new constitution giving parliamentary representation to Coloureds and Indians.

Against this background of reform, education was given significant attention. The De Lange Report (1981) on education had some influence in bringing about this change.<sup>19</sup> Efforts were made to provide more educational opportunities for Africans, train more qualified African teachers, phase out disparities in financing, reform the curriculum and build more schools (Claassen 1995:457). On the issue of private education the De Lange Report stated that 'private schools, which will be providing for educational needs not provided or perceived to be provided for by State schools, should be accepted as an important innovative factor in the provision of education'.

During the 1980s there was indeed a gradual decline in the confrontational stance between the State and private schools. Open schools were firmly established and the number of black students in open schools had increased. In

the Cape almost all applications had been approved and there were 500 black students and in Natal 200 black students had been registered. In the Transvaal, where there was still some resistance to open schools, only about 350 of the 850 enrolled black students had been approved. In the Orange Free State no progress had been made (Christie 1990b:187). In 1981, further impetus was given to desegregation in private schools with the enactment of the Financial Relations Amendment Act 102 of 1981.<sup>20</sup> This Act empowered provinces to admit black pupils to white-registered private schools. However, the provinces were already doing this and it still fell short of providing legal clarity on the position of private schools.

Although the government was endeavouring to implement major changes, education reform was still based on the principle of 'separate but equal', and the changes stopped short of abolishing segregated education. The National Policy for General Education Affairs Act 76 of 1984 entrenched the policy of separate education. Education was classified as an 'own affairs' function, which meant separate education departments for the different population groups. This was in response to constitutional changes rather than educational needs and demands. This Act introduced a major change for private schools in so far as they were now placed under the white 'own affairs' Department of Education and Culture (House of Assembly) thereby reducing provincial control over private schools. The main purpose of this was to allow the State to develop a uniform national policy for desegregated private schools.

A major consequence of the legislative shift was the financial position adopted by the State. FW de Klerk, then Minister of National Education, indicated that the level of state funding to private schools would be linked to the racial composition of a school. This was based on the argument that the State could not be expected to support a policy with which it did not agree. The State therefore sought to exercise control over admissions through implementing a quota system and by fiscal control. In view of this, three levels of subsidy were provided for - 45% subsidy, 15% subsidy and no subsidy at all. In order to qualify for subsidies, schools had to comply with regulations which could restrict their autonomy. These included racial quotas, teacher appointments being approved by the education authorities and curriculum controls. It was also believed that a 45

percent subsidy would be given to schools that were 90% white, 15 percent to schools that were 80% white and to qualify for registration schools would have to be at least 70% white (Christie 1990b:190). This was rejected and private schools resolved to take a strong stand against subsidies linked to quotas. When the final regulations were published in 1986 no mention was made of racial quotas and racial clauses were excluded. The relationship between the State and private schools, and the legal position of private schools were finally consolidated in the Private Schools Act 104 of 1986.

### **2.2.5 The Private Schools Act 104 of 1986**

The Private Schools Act 104 of 1986 signalled an important legislative step towards formally recognising the legal rights of open private schools. The purpose of the Act was:

to provide for the registration of, the control over, and the making of financial grants to private schools, and for matters connected therewith.

The Act formally brought open private schools into the sphere of white own affairs education and under closer state regulation. In terms of Section 9 of the Act, the Minister of Education was empowered to make regulations on the:

- (a) admission of pupils to a private school
- (b) admission of pupils to examinations
- (c) appointment of teachers
- (d) keeping of registers and other documents
- (e) inspection of private schools
- (f) granting of subsidies
- (g) lapse or cancellation of the registration of a private school.

#### **2.2.5.1 Registration**

The conditions for registration and subsidisation of private schools were an important feature of the Private Schools Act . These schools were now legally entitled to apply for state subsidy. In terms of section 3, application for registration had to be submitted to the Head of Education in writing, and section

5 stated that the registration would be subject to certain conditions. The conditions were set out in the Regulation regarding the registration and financial grants to private schools (South Africa. Admin: House of Assembly 1986) The conditions are summarised as follows:

- (a) The principal was responsible for the organisation and control of the school.
- (b) School buildings had to comply with regulations.
- (c) The Head of Education had to be satisfied that the school would make a contribution to education.
- (d) Legal provisions relating to the age of pupils entering and leaving school, and compulsory education also applied to private schools.
- (e) Schools had to have a minimum of 20 pupils.
- (f) The admission of pupils was subject to the Constitution of the Republic of South Africa Act 110 of 1983.

In general, the provisions concerning the registration of private schools were not unreasonable, in so far as they did present a means of preventing just anyone from simply opening a school. However, the fact that admission was still subject to the 1983 Constitution, which enforced separate schools, meant that private schools were not entirely free from the segregationist laws. Moreover, it was required that more than half the number of pupils registered had to be white (South Africa. Admin: House of Assembly 1990). Thus, although the government had to accept the existence of non-racial private schools, it did seek to exercise its control over student admission.

#### 2.2.5.2 Subsidisation

Up until 1986 there was no uniform basis of subsidisation between the various departments. It was only from 1986 that there was an increase in state subsidisation to private schools (Bot 1992:84). According to section 6 of the Private Schools Act 104 of 1986, a private school was entitled to receive a grant provided it met the necessary requirements. Subsequent regulations made provision for a grant of 85% (in the first year of registration) and 45% (after the third year of registration) (South Africa. Admin: House of Assembly 1991). The subsidisation requirements are summarised as follows:



- (a) Schools had to maintain satisfactory academic standards.
- (b) Schools had to meet the education, cultural and/or religious needs of children not met by public schools.
- (c) Pupils had to be accommodated in approved buildings.
- (d) The school had to follow an approved medium of instruction.
- (e) An annual audited financial report had to be submitted.
- (f) The grant had to be paid into a *bona fide* school bank account.
- (g) The school had to comply with the certification requirements laid down by the South African Certification Council.

In addition to this, a school could receive a grant of 45%, if it provided a remuneration package to teachers that was not more favourable than public schools and determined the promotion requirements similar to those of public schools. Through the grant system, the State could exercise far greater control over private schools and for this reason many private schools avoided obtaining a state grant. Moreover, while there was no specific provision linking the racial composition of a school and level of funding, subsection (b) gave the State some say over religious and cultural matters.

#### **2.2.6 Provision of private schools for 'non-white' groups**

Although the majority of private schools were registered under the House of Assembly (white affairs), apartheid legislation dealing with the education of African, Coloured and Indian children also made provision for the establishment of private schools, although this was not encouraged.<sup>21</sup> As in the case of private schools registered with the House of Assembly, all private schools for African, Coloured and Asian children had to be registered with the respective education departments and were subject to certain regulations regarding teacher appointment, curriculum, language requirements and examinations. Table 2.2 indicates how the proportion of students in private schools has varied according to population group between 1987 and 1990.

**Table 2.2 Private school enrolments 1987 - 1990 schools (excluding independent homelands)<sup>1</sup>**

	1987	1988	1989	1990
Total	133 866	137 071	91 540	103 845
White	96 971	92 685	46 486 <sup>3</sup>	52 801
Indian	2 484	5 579	5 453	5 904
Coloured	6 623	7 920	8 547	7 865
African <sup>4</sup>	27 788	30 887	31 601	37 284
Non-independent	7 236	7 794	7 267	7 210
DET <sup>2</sup>	20 552	23 093	24 334	30 074

<sup>1</sup> Independent homelands were the Transkei, Bophuthatswana, Venda and Ciskei (TBVC)

<sup>2</sup> Department of Education and Training

<sup>3</sup> There is no obvious reason for the drop in white enrolments

<sup>4</sup> Figures for the TBVC states were not available

Source: Muller (1992:343)

### **2.2.7 Privatisation in the 1990s**

For the sake of completeness, this section concludes with a brief comment on the privatisation initiatives of the 1990s which marks a transition from the apartheid system of education to non-racial education. Privatisation is a fairly recent phenomenon in education and should not be confused with private school education.<sup>22</sup> For education, privatisation has been offered as a way of reducing the State's burden by transferring a major share of the responsibility of providing and financing education to the private sector. Essentially, privatisation means that the State or local government provides schools with a certain amount of finance to cover capital costs while the rest comes from the parent community. The main difference between private schools and privatisation is that there is no interest group or sponsor, such as a church, involved as is the case with private schools (Bot 1992:54-55).

The process of privatisation, initiated in 1990 with the introduction of the new school models - Model A, B and C, and later Model D, was a highly controversial

issue.<sup>23</sup> This process allowed for the privatisation and semi-privatisation of previously white-only state schools. Although initially the majority of white state schools chose to remain Model B schools, that is, a state school, in August 1992, schools were compelled to change to Model C, ie state-aided schools or semi-private schools. Reactions to this new education policy were mixed. Some welcomed the move while others opposed the models mainly on the grounds that it did little to dismantle apartheid education or meet the needs of the majority of the school-going population. One of the most controversial aspects was the transfer of ownership of schools and property to the local communities which are predominantly white communities. According to Samuel (in Collins 1992:52-54), 'the wholesale selling of national resources is a huge travesty of justice. Schools which were built, expanded and maintained with public funds have now suddenly become private property'. This amounted to giving to a few people what previously should have belonged to all and was a way of maintaining the status quo.

The fact that the State is still a major provider raises the question as to whether this process constitutes privatisation. Enslin (1992:66) argues that while the imposition of Model C schools is indicative of a process of privatisation, there is insufficient evidence to support the claim that South African education is undergoing privatisation. What is clearly evident, however, is the shift of responsibility and the fact that parents and the broader community are now required to carry a greater share of the financial cost of schooling. Whether or not South Africa will continue along this path of privatisation remains to be seen.

## **2.3 SUMMARY**

This chapter presented an overview of the development of private education in South Africa from a legal and historical perspective. It highlighted some of the most important legal developments in private education. The growth of private schools was relatively haphazard. Prior to 1814, most education was private and was generally overseen by the Dutch Reformed Church. In the interior, education was provided by itinerant teachers, often of dubious character and qualification. The first rudimentary formal education system appeared in the Cape in 1839. Initially, there were few regulations to oversee education but this gradually changed as state schooling became more widely established and formalised.

Schooling for black children was very limited and provided mainly by missionaries and the churches who maintained control over such education until 1953.

By the turn of the century, state schools had been established in all four colonies, and each had some education system. A number of significant developments to take place were the introduction of compulsory education, the establishment of a system of grants-in-aid to schools, including private schools that were not conducted for profit, the establishment of a system of school boards in the Cape, Transvaal and Orange Free State, which were responsible for the management of schools and the development of a system of official state inspection. Although private schools continued to flourish alongside state schools, there was a significant shift of power from the private to the public sector. This also marked the transfer of responsibility for education from the church to the State. The widening of state control over education was accompanied by a growth in education legislation. However, the legislative history of education indicates that the law separating public and private education was not established and therefore it was inadequate for preventing the State from exercising its control over the development and management of private schools.

The National Party's victory in 1948 marked a new era in education and was a turning point in education legislation and policy. Between 1948 and 1990 the following were some of the main features that characterised South African education:

- (1) The system of apartheid education was entrenched through a series of racially-based laws. This resulted in a segregated, unequal and authoritarian system of education. The State's widening control over education was seen as political expediency to enable it to enforce, control and maintain the system of apartheid.
- (2) The philosophy of Christian National Education was implemented and enforced through legislation and centralised control over education.

- (3) Tension and conflict between the State and the private school sector increased as the State's influence and control over education steadily increased.

Having provided an overview of the development of private education from a legal and historical perspective, the next chapter will focus on the nature and purpose of private education today, and the legal position of private education within the new democratic constitutional dispensation.

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#### ENDNOTES

- <sup>1</sup> According to Smurthwaite (1981:62-65), the Catholic Church was a relative latecomer to the Cape colony. The first Catholic Bishop, Raymond Griffith, arrived in April 1838, one hundred and eight years after the arrival of Jan van Riebeeck. Griffith opened a school in Cape Town at the end of 1838. The first convent was started by the Assumptionist Sisters in Grahamstown in January 1850. This marks the real beginning of Catholic education in South Africa.
- <sup>2</sup> The 'siekentrooster' or comforter of the sick, was sent from Holland to the Cape to care for the spiritual needs of the inhabitants and to assist with education (Malherbe 1925).
- <sup>3</sup> De Mist was greatly influenced by events of the day such as the French Revolution and the contemporary legislation on education in Holland.
- <sup>4</sup> Although education in South Africa was greatly influenced by developments in England, during the early 1800s secular and state schooling was only beginning to take shape in England. In 1807, the idea of introducing a system of state elementary schools in Britain that would fall outside the control of the Church was rejected by the House of Lords. It was only after 1870 that secular schools under state control began to evolve in England.
- <sup>5</sup> In terms of Act No 4 of 1880, a public elementary school shall mean any primary or elementary school which, in matters of inspection and religious instruction, complies with subsections 2 and 7 of section 11 of Act No 16 of 1877.

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- <sup>6</sup> Du Toit was a founder member of the Afrikaner Bond, a political and cultural organisation aimed at furthering the cause of the newly developing Afrikaner nation (Behr 1984:13).
- <sup>7</sup> Section 1 of the Education Law 8 of 1892 stated the following:
- The government of the South African Republic, proceeding on the principle that it is the duty of parents to provide for the education of their children, limits its interference with educational matters - (a) to the encouragement and support of individual enterprise among the burghers by pecuniary contributions in support of schools; (b) to the supervision of schools, - as far as they consider themselves called upon to take precautions that the future burghers receive the requisite Protestant Christian training...
- <sup>8</sup> Named after General Jan Smuts, the Colonial Secretary and Minister of Education.
- <sup>9</sup> The South Africa Act of 1909 was passed by the British Parliament and moulded in the tradition of the Westminster system. The Act provided for a constitutional head of state, an executive council or Cabinet, a Parliament consisting of an Upper House (the Senate) and a Lower House (the House of Assembly) (Basson & Viljoen 1988).
- <sup>10</sup> According to Walford (1990:5), the Headmasters Conference in Britain was first proposed in 1869. The purpose was to hold a regular meeting of the major endowed schools in order to develop a defence against the perceived threat to the independence of the endowed schools.
- <sup>11</sup> The Private Schools' Association (Natal) differed from the HMC in that it was an association of schools rather than individuals and had the necessary authority to act on behalf of schools. It was later disbanded, following the formation of the Association of Private Schools of South Africa in 1974.
- <sup>12</sup> Private schools were generally for whites but not exclusively. Moreover, although churches provided education for all race groups, it was separate. But, there were also no real formal racial barriers such as those which existed after 1948.
- <sup>13</sup> The main principles of Act 39 of 1967 can be summarised as follows:
- (a) Education in schools maintained and managed by the State shall have a Christian character, but the religious convictions of the parents shall be respected.

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- (b) Education shall have a broad national character.
  - (c) Either English or Afrikaans shall be the medium of instruction.
  - (d) Education shall be compulsory.
  - (e) Education shall be free.
  - (f) Education shall be provided in accordance with the ability and aptitude of pupils and the needs of the country.
  - (g) Syllabuses, courses and examinations shall be co-ordinated on a national basis.
  - (h) Parents shall have a say in education.
  - (i) Consideration shall be given to suggestions and recommendations of officially recognised teachers' associations.
  - (j) Conditions of service and teachers' salaries shall be uniform.

<sup>14</sup> Section 14 (1) of Act 110 of 1983 described own affairs as matters which specifically or differentially affected a population group in relation to the maintenance of its identity and the upholding and furtherance of its life, culture, traditions and customs. Section 15 (1) of Act 110 of 1983 described general affairs as those matters which were not own affairs of a population group in terms of section 14.

<sup>15</sup> See in general Nasson and Samuel (1991) and Mncwabe (1990).

<sup>16</sup> The FAK was the external front created to carry out policies planned by the Broederbond, a secret organisation whose main aim was the advancement of 'Afrikanerdom'. A direct implication for education was its anti-English stance (Malherbe 1977:664-666).

<sup>17</sup> 1951 (3) SA 589 (AD)

<sup>18</sup> The term 'open' is used to denote schools that are racially mixed. There has been extensive debate over the concepts 'open' and 'integration' among church groups. In 1976 the Education Council of Associations of Religious (ECAR) resolved to drop the use of the term 'integration' because of its apparent highly emotive connotations (Christie 1990a:24).

<sup>19</sup> In June 1980, amidst the growing crisis in education following the 1976 Soweto Riots, the National Government requested the Human Sciences Research Council (HSRC) to conduct an in-depth investigation into all facets of education. A Main Committee, comprising 26 members under the chairmanship of Professor JP de Lange, managed the investigation.

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- <sup>20</sup> Section 15(A)1 of the Act stated that 'Notwithstanding anything to the contrary in any law contained, a provincial council may make ordinances authorising and regulating the admission of persons who are not white persons as pupils to schools in the province registered with the provincial administration as private schools under a provision of any law and which are not schools maintained, managed or controlled by such administration'.
- <sup>21</sup> See section 8 of the Education and Training Act 90 of 1976, section 6 of the Indian Education Act 61 of 1965 and section 6 of the Coloured Persons Education Act 47 of 1963.
- <sup>22</sup> For a comparative study on the privatisation of education consult Mattheus (1993) *Onderwysprivatisering- 'n verkennende studie*.
- <sup>23</sup> Model A school is a fully private school.  
Model B is a state school which has control over its own admission policy.  
Model C is a state-aided or semi-private school which is partially funded by the State.  
Model D is a state school under the control of the House of Assembly which has more than 50% black pupils.



## **CHAPTER 3**

### **THE NATURE, PURPOSE AND POSITION OF PRIVATE EDUCATION IN THE PRESENT EDUCATION AND LEGAL SYSTEM**

#### **3.1 INTRODUCTION**

The previous chapter traced the historical legislative roots of private education as it developed in a socio-political context. Private education existed before state schooling, but since the 18th century it has developed alongside the state schools. It has therefore always formed part of the organised education system in South Africa. The outline of the historical development of private education from a legal perspective provides essential background to our understanding of what is presently occurring in private education. Against this background, the focus now is on the nature and purpose of private education from a philosophical and legal perspective. The chapter begins with an overview of the size of the private education sector which is followed by a discussion on the underlying rationale for the pursuance of private education. The second part of this chapter addresses the South African constitutional dispensation and the position of private education within the constitutional framework. Particular attention is given to the application and scope of the bill of rights, which ultimately influences all aspects of the internal operations of a private school.

#### **3.2 THE SIZE OF THE PRIVATE EDUCATION SECTOR**

It is worth recalling that prior to the 1800s all or most education was private in South Africa. It was only in 1834 that a rudimentary system of state schools began to emerge in the Cape. As the State gained greater control over the provision of education, private education gradually gave way to public education. However, in spite of a state monopoly over education and shifts in enrolment, the private school has continued to retain an important position in the education system and has continued to progress alongside the state school sector. Today, the private education system is small but significant; only about 1% of the school population constitutes private education. In the 1980s there was an upsurge in private education and this is likely to continue through the 1990s amid deep concern about the present education system and the ability of state schools to

maintain and, in fact improve the quality of education. According to Henning (in Van der Kooy & Pierce 1996:2), the number of private schools has grown from 93 in 1991 to 550 in 1995. The lead article in the *Financial Mail* (Flight from state schools 1996:24-25), also reports that schools which saw student numbers decrease during the early nineties recession are now swamped with applications. Schools and colleges established in recent years are full and planning to expand. For example, Bridge House, near Franschoek in the Western Cape, opened with 90 students and saw this increase to 155 in 1996 when the high school was launched.<sup>1</sup> In Gauteng alone, the number of private schools rose from 153 in 1994 to 168 in 1995, and the number of students grew by 5.7% (Van der Kooy & Pierce 1996:3). There has also been a marked increase in the number of Afrikaans private schools, which had virtually disappeared by the 1950s. There are now 43 Afrikaans 'Christelik Volkseie Skole' which have emerged during the last few years, for example.<sup>2</sup> This conservative group of schools share an ideology based on Calvinistic-based Christianity, which seeks to relate the teaching of the Bible to all aspects of school life. The fundamental aim of these schools is to maintain the Afrikaans culture, language and religion (Heiberg 1992:29-35). Moreover, according to Bot (1992:84), the number of private correspondence colleges has also increased. According to 1989 figures, there are over 60 colleges attended by approximately 250 000 students. Although such figures are not always reflected in the statistics on private schools, because the colleges are registered in terms of section 11 of the Correspondence College Act 59 of 1965,<sup>3</sup> they do provide further evidence of the diversity and growth within the private sector.

Table 3.1 shows the number of students enrolled in private schools in 1990 and 1993. In 1993 there was an increase in the number of students attending private schools. This increase coincided with the establishment of the new school models (see section 2.2.7), which resulted in some state schools becoming private schools, and the desegregation of the entire school system. Table 3.2 shows that private enrolments are not evenly distributed across the country. The largest number of private schools and private school-going children are found in Gauteng. Moreover, for historical reasons that were discussed in the previous chapter, few private schools are found in the Orange Free State, which is mainly Afrikaans speaking and where fewer private schools were established.

**Table 3.1 Number of students in private schools according to population group for 1990 and 1993**

	1990	1993
Whites	52 801	56 524
Indians	5 580	6 266
Coloureds	6 558	4 796
Blacks	37 284	69 322
Self-governing territories	7 210	8 324
Rest of South Africa	30 074	60 998
All population groups	103 854	136 608

Source: Education realities in South Africa. NATED 02-300 (91/06; 93/12)

**Table 3.2 Number of students according to province for 1994**

Province	Education sector			Total
	Private school education	Public school education	Special school education	
All provinces	171 692	11 614 857	45 517	11 832 066
Gauteng	82 776	1 361 817	12 653	1 457 246
Western cape	19 279	821 481	10 849	851 609
Northern cape	3 111	193 657	719	197 487
Free state	6 758	757 383	1 789	765 930
Eastern cape	13 089	2 406 587	3 453	2 423 129
Kwazulu/Natal	27 456	2 403 773	10 131	2 431 370
Mpumalanga	2 705	831 396	1 096	835 197
Northern	9 255	1 937 131	2 188	1 948 574
North-west	7 263	901 632	2 639	911 534

Source: CS Education according to province for 1994. Report 233 (95/08)

A significant feature of education in general is the immense diversity which has come about largely as a result of the policy of separate education and the application of different policies, standards, requirements and so on for different population groups. Likewise, within the private education sector this diversity is also evident. Private schools are not a homogenous group. There are a variety of private schools to be found in South Africa which provide a wide range of educational services ranging from preprimary to post-secondary education, and which also vary in size and quality.

### **3.2.1 Religious schools**

Most private schools are church-affiliated institutions. There is also great diversity in the religious affiliation of private schools. Although it has not been possible to obtain very recent or accurate statistics, table 3.4 gives an indication of the distribution of church-affiliated schools. These schools are owned, controlled and administered by a religious institution or organisation. The largest number of private schools are Roman Catholic, followed by the Anglican schools, many of which are affiliated with the Independent Schools' Council.<sup>4</sup> This is also evident from the survey conducted on private schools for this study (see chapter 4). Table 3.3 illustrates the number, type and distribution of religious schools that participated in the survey.

**Table 3.3 Distribution of church-affiliated schools in survey**

	Frequency	Percent
Roman Catholic	46	44.7
Methodist	3	2.9
Anglican	18	17.5
Islamic	5	4.9
Baptist	3	2.9
Christian, other	23	22.3
Jewish	5	4.9

**Table 3.4 Private schools according to religious denomination for 1992/93**

School Type	No. of schools	Student enrolments
Catholic	69	21 231
Anglican	29	14 049
Jewish	25	7 787
Interdenominational	35	9 460
Christian schools	39	3 448
Methodist	6	3 023
Baptist	2	439
Protestant	1	750
Greek Orthodox	1	774
Seventh Day Adventist	12	1 415
Rhema	2	322
Gereformeerde	3	186
Muslim	10	3 078
Church of Jerusalem	1	29

Source: After Gotkin (1993). The data is only an estimate and it excludes DET schools for which no figures were provided.

### **3.2.2 Secular schools**

A growing number of private schools are owned, controlled and managed by private individuals, an organisation or a trustee with no specific religious affiliation. These schools are generally founded on the basis of cultural or language needs, or to serve a special education need.

## **3.3 DEFINING 'PRIVATE EDUCATION'**

Attempts to examine private schools are immediately met with the problem of definition. Defining what is meant by 'private education' is not as simple as one would assume. Moreover, there are a variety of terms used to designate the

private sector. However, a seemingly obvious starting point is to look at the legal definition of 'private'. The Private Schools Act 104 of 1986, for example, defined 'private school' as any school other than -

- (a) (i) a public school;
  - (ii) a state-aided school;
  - (iii) a private school for specialised education;
  - (iv) a private pre-primary school.
- (b) a church school or farm school mentioned in section 40 of the Education Affairs Act of 1988.<sup>5</sup>

An examination of how the law defines private education or a private school also does not prove adequate because of the limited nature of legal definitions. As Mattheus (1993:85) points out, this definition is stated in the negative in that it states what a private school 'is not'. Moreover, the definition is inadequate in that it does not provide for the growing interest in alternative forms of private schooling, for example, home schooling. The Act also only pertains to schools that fell under the control of the previous Department of Education and Culture (House of Assembly).

According to Muller (1992:340), in South Africa, the term 'private school' is the generic term for all schools that operate in one way or another outside the conventional state or public education system. This is a very broad definition and includes a wide variety of 'private' schools which range from the traditional church-affiliated school to nondenominational progressive schools and 'street academies'.<sup>6</sup> The word 'independent' is often used synonymously with 'private' but in South Africa, the word 'private' is most commonly used. However, recent South African legislation now uses the term 'independent' but does still not improve on the definition given in Act 104 of 1986 in spite of the fact that the position of private education in South Africa is under close scrutiny and remains a controversial and high profile issue on the political agenda. For instance, the Gauteng School Education Act 6 of 1995, Northern Province School Education Act 9 of 1995 and the Mpumalanga School Education Act 8 of 1995 define a private school simply as 'a school other than a public school'. The South African Schools Act 84 of 1996 fails to provide a definition. It merely lists an independent

school as 'a school registered or deemed to be registered in terms of section 46', which deals with basic requirements of registration and states that no person may establish an independent school unless it is registered by the Head of Education.

For further definitions of private education, it is instructive to survey the research on private education in other countries. James (1989a:214), for example describes private schools in the United Kingdom as those with substantial non-government decision-making authority, which usually goes together with some reliance on private funding. Valente (1985:337), writing about private schools in the USA, defines a private school as one which 'is controlled by an individual or by an agency other than a State, a subdivision of a State, or the federal government, usually supported other than by public funds, and the operation of whose program rests upon other than publicly elected or appointed officials'. In England, the term 'independent' is now used and is defined as those schools providing an education for five or more school-going children which are not maintained by the State (Walford 1990:3).<sup>7</sup> Similarly, Bergen (1989:85), with reference to Canada, defines a private school as 'a school other than one under the governance of a local public school board or of a provincial or federal department.' Gellert and Ritter (1985:341) also refer to private schools as 'those schools which are under the financial organisational control of organisations and institutions other than state or government administrations'. Likewise, private schools in Australia are schools which are not owned by the State or administered by government authority, whose teachers are not State employees and which charge tuition fees (Anderson 1992:218).

The definitions and descriptions of private education/schools in different countries point to some important common aspects of private schooling. In general, definitions include the following elements:

- (i) Ownership: private schools are mostly independently owned
- (ii) Governance: schools are private to the extent that they are controlled, governed and managed by a non-government agency

- (iii) Finance: a school is private to the extent that it receives its income largely or exclusively from non-government entities and public to the extent that it relies on the state for funding.

This distinction is not without problems, however. The focus on 'non-public' is, to some extent, misleading for at least two reasons. First, schools perform a public function and secondly, the degree of state involvement begs the question of how independent private schools are. Certainly in South Africa, compared with Canada and the USA for example, the distinction between the public domain and private domain is more blurred. As Enslin (1992:64-66) points out, the distinction between private schools and public schools is in fact not as easy to make as one would imagine. Although superficially, private matters are often distinguished from public matters on issues such as ownership, accountability, access and control, education, whether private or public, is still a public affair (see section 3.5.3.3). Moreover, the distinction between public and private in the South African context has been complicated by apartheid policies and practices which rendered many public matters private. For example, many public places were reserved for whites only. Access to public schools was also limited (see chapter 2). Furthermore, as more state schools become semi-privatised and more private schools received state subsidy, the distinction between state schools and private schools becomes increasingly blurred.

Notwithstanding the preceding discussion, the term 'private', as defined in Act 104 of 1986, has been used in this study for the following reasons: it is the term most used in literature, in particularly legislation; the term 'independent' is relatively new to South Africa and has only recently been used in legislation (which appeared some time after the bulk of this study was conducted) and lastly, the term 'independent' is not an altogether satisfactory term since the private school sector is far from independent from the State.

### **3.4 THE GENERAL SIGNIFICANCE AND PURPOSE OF PRIVATE EDUCATION**

Although private schools have always existed, their existence has been questioned and challenged over many decades. There are both advocates and opponents of private education. Critics of private education generally view private



institutions as elitist that perpetuate educational inequalities, discrimination and class differentiation. Some opponents have gone so far as to argue for the abolition of private schools. Paradoxically, however, this is in direct conflict with the fundamental principles of democracy and liberty that form the basis of government in countries in which private education is recognised. Therefore, in spite of the criticisms of private education, exponents have offered diverse philosophical and legal arguments that provide a rationale for the existence of private schools. In the absence of empirical data on why parents choose private schools in South Africa, it is only possible at this stage to speculate and extrapolate the different arguments from broad international research.<sup>8</sup> Some of the main arguments for establishing private schools are now discussed.

### **3.4.1 Liberalism**

The existence of private education has its foundations in the principle of liberty which is an essential value of democracy (White 1994:86). The thrust of the liberal tradition is on preserving the rights of individuals and groups from undue interference by state institutions. The emphasis is thus on the freedom of the individual, self-determination and the right to be different. Accordingly, private schools are viewed as an expression of liberty and a manifestation of a pluralistic democracy through which diversity and liberal democratic values are fostered.

In the liberal tradition, recognition is given to the freedom of the individual and the right to be different. According to Crittenden (1988:186), liberal democratic values encompass aspects such as respect of each individual as capable of rational self-determination; the equal right of each individual and that each individual should be free to realise his or her capabilities. Crittenden therefore endorses the view that States are subservient to the law and should strictly limit their intervention in education. Likewise, Erikson (1989:21) asserts that 'government intervention should be permitted only demonstrably essential to the common wealth' but that where 'intervention is needed, the response should be limited'. Thus in the pursuit of autonomy, state intervention in education should be kept to a minimum, and only where it can be of common good. Hirschhoff (1986:40-45) also argues that private schools perform an essential role in preserving and protecting fundamental democratic rights, which include freedom of conscience, free exercise of religion, freedom of association and freedom of

speech, by providing a variety of educational environments that cater for diverse religious, cultural, sociological, political and educational beliefs.

### **3.4.2 Freedom of association**

Freedom of association is central to the liberal philosophy and is one of the reasons most frequently given for the existence of private schools. Hirschhoff (1986:44) defines freedom of association as the 'right of people to join together in groups to share ideas, values, beliefs and goals'. Strong supporters of private education therefore believe that education choice and the right of parents to direct the education of their children is thus a basic right in a democratic society and is regarded as an important expression of freedom of association, belief and expression. According to Halstead (1994:i) 'choice is an expression of autonomy; to take responsibility for one's own pathway through life is fundamental'. Choice of schooling, however, is more than just an application of the freedom of association and expression. As Halstead (1994:12) argues, parental choice in education involves deeper political and philosophical questions.

Advocates of the 'choice theory' argue that choice of education is a fundamental right of parents and that parents are better suited than a bureaucracy to choose a school that suits the needs and interests of their children. Moreover, it is suggested that there is benefit, especially for the younger child, in attending a school that reflects the values of the child's family. It is also argued that increased parent choice leads to benefits such as greater motivation amongst students, the development of positive attitudes towards schooling and an increase in competition which encourages better educational practices (Fox 1985; Halstead 1994; Walford 1994a).

International and national human rights treaties as well as education legislation, have recognised the rights of parents to choose the school they wish their children to attend. For example, according to Article 26(3) of United Nations Declaration of Human Rights (1948):<sup>9</sup>

parents have a prior right to choose the kind of education that shall be given to their children.

In South Africa, freedom of choice and association are also now firmly embodied in the bill of rights. Section 17 states that:

every person shall have the right to freedom of association.

While schooling is not specifically mentioned, it can be interpreted to imply the choice of schools. Freedom of association is not only important in terms of political and economic freedom, but also in other areas such as cultural, religious and social freedom. In this regard, the White Paper on Education and Training (South Africa. DNE 1995:21) endorses the rights of parents to choose their children's education:

Parents or guardians have the primary responsibility for the education of their children, and have the right to be consulted by the State authorities with respect to the form that education should take and to take part in its governance. Parents have the inalienable right to choose the form of education which is best for their children, particularly in the early years of schooling, whether provided by the State or not, subject to reasonable safeguards which may be required by law. The parents' right to choose includes choice of language, cultural or religious basis of the child's education, with due respect to the rights of others and the rights of choice of the growing child.

Therefore, while there are legitimate reasons for the State to impose compulsory education, parents have the right to choose how they wish to fulfil that legal obligation. If a state forced parents to send their children to state schools only, this could be viewed as an interference over parents' fundamental rights to educate and bring up their children, and thus a violation of the bill of rights. The State cannot compel a child to attend a public school. Parents can fulfil this obligation by choosing to send their children to private schools.

#### 3.4.2.1 The limitation of choice

Critics of private education have challenged the notion of choice, and the extent to which parents are able to exercise any choice remains a contentious issue. Griggs (1985) argues that while freedom of choice is used to defend private schooling, it is a misleading phrase because of the limitations placed on choice.

According to Griggs (1985:2), 'choice is based on a completely false premise; that *all* parents have a choice'. Griggs cites tuition fees as one factor that places private schooling beyond the reach of the average family. Choice is thus available to those parents with above-average income, and although not all private schools charge high tuition fees, it is misleading to suggest that families have a choice. In this regard, high tuition fees work as a 'social selector', and while many children from lower income groups do attend private schools, they do not form a substantial portion of the private school population. A similar argument can be advanced for private schooling in South Africa where tuition fees range from R2 500 to more than R18 000 a child per annum.

In South Africa, choice in education has been particularly influenced by political considerations. On the one hand, choice of schooling has been thwarted by legal restrictions and educational policies that have denied the freedom of choice and association by controlling access to schools based on racial categories. For example, the Group Areas Act 36 of 1966, the Constitution of the Republic of South Africa Act 110 of 1983 and the National Policy for General Education Affairs Act 76 of 1984 entrenched separate education and prevented parents from exercising a choice. On the other hand, some choice has been made possible with the growth and development of private schools. By choosing private schools, many parents have not only done so for educational reasons, but also to remove children from a school system that has enforced racial and cultural separatism, and a philosophy that is counter to their value system. However, some argue that parents may choose schools that do little to encourage children's sense of citizenship and tolerance, or which leads to increased racial segregation.

Choice of private schooling is also limited by economic and social factors. Families with financial means are able to make a choice. But some parents who would perhaps like to send their children to a particular school might be prevented from doing so because they live too far from the school, transport facilities are inadequate or tuition fees are prohibitive. In addition to this, some research has also pointed out that it is the better educated parents and those of higher social class who are more likely to exercise a choice in the first place (Walford 1994b:76).

Schools themselves also do not necessarily have an open policy that supports this basic right. For example, private schools established for a particular religious group may exclude pupils who do not belong to that particular religion. Selection procedures used by schools to select children for admission also serve as a restriction on choice. Parents may choose a particular private school for their children but, through no fault of their own, might not fulfil the necessary requirements for admission. The entrance examination used by some private schools as part of the selection process is usually of a high standard and academically demanding (see section 5.5.2.3). Moreover, it is asserted that modes of selection favour those children who have the necessary 'cultural capital' that is virtually a prerequisite for fitting into the school culture. Bourdieu (1973) refers to the dominant culture as 'cultural capital' because it can be translated into wealth and power which is achieved through the education system. But, because the education system is controlled by the dominant class, their 'cultural capital' is demanded by the school but it is not necessarily made available to all students. In other words, children who come from similar backgrounds and culture to that of the school will invariably have the necessary values, language and educational experiences that the school requires. It is therefore argued that choice leads to further inequalities and social class differentiation and that it benefits some children but can be a detriment to others.

### **3.4.3 Freedom of religion and culture**

Most countries in the world today, including South Africa, are multi-cultural and multi-faith. As a result of cultural and religious diversity, the rights of religious freedom and culture are among the most important basic human rights. Such rights are generally recognised in international human rights instruments and are almost universally recognised in bills of rights.<sup>10</sup> Religion and culture are considered together because they are so closely interwoven. Although the concept 'culture' is difficult to define and, indeed, there is no single definition of culture, it is generally accepted that culture is a broad encompassing term that embraces the customs, beliefs, values, ideologies and practices of a group of people that identifies that group (Dlamini 1994:573). These are the aspects that constitute the very core of people's being and identity. According to Dlamini (1994:573-574), religion and culture are essential to human existence and therefore individuals have a right to religious freedom and culture. The right to

religious freedom and culture is aimed at recognising religious and cultural diversity and preventing people from being treated unequally and unfairly on account of their culture, beliefs and values. Moreover, protection of such rights is necessary for allowing people to be different and to prevent one culture from dominating and suppressing others. In essence, freedom of religion and culture is fundamental to creating a just and democratic society.

#### 3.4.3.1 Religious freedom, culture and private education

Since education is the primary means of preserving and transmitting culture, religious beliefs and values, it is not surprising that one of the most compelling reasons for establishing private schools is to provide an education based on particular religious and ideological beliefs and a concomitant value system. The right of religious freedom is the *sine qua non* for the establishment of private schools. It is argued that in a free, democratic society, parents should have the right to choose the kind of education they want their children to receive, and select schools that reinforce their traditions, values and beliefs. Van Geel (1989:256-258), for example, states that private schools are an expression of the liberty of individuals to pass on their beliefs, their values and their ways of life to their children. Therefore private school choice is important for preserving the rights and freedoms of belief and conscience. Religious freedom is a fundamental human right and constitutional and statutory law recognise the rights of parents to choose an education for their children according to their religious persuasion (see also endnote 40). These legislative provisions are discussed more fully further on and in chapter 5.

While there is little disagreement with the rights of parents to exercise a say over the values, beliefs and traditions that their children learn, teaching values is an important task of the school. According to Rebell (1989:39), the inculcation of basic values has been the fundamental function of the school. Values, beliefs and attitudes that form part of an individual's conscience are formed and nurtured while in school. However, families do have different religious, social and political beliefs and values which may be incompatible with a school's, in particular a state school in which the ideology and norms of the State are imposed and reproduced. The State is thus in a powerful position to exercise its control over the transmission and formation of values in children.

Although the State has a legitimate and compelling interest to instil the kinds of values, traditions and philosophies that will promote the interests of the State and civil society as a whole, many parents believe that the power over the formation of children's value system should not be in the hands of a state structure. At the core of the issue is the tension between maintaining universal, national societal values (which are regarded as essential for health and effective participation in the broader society) and the protection of private, personal values. In keeping with the liberal, democratic tradition, some argue that the State should not be able to impose values that may conflict with the private beliefs of students and their families (Rebell 1989:39). To this end, private schools seek to transmit the values and religious beliefs and traditions that are commensurate with the community they serve. In this way parents can exercise the primary influence over the socialisation of their children. Thus, according to Schoeman (Almond 1994:76), parents' control over children limits the control of society to determine the lifestyles and beliefs of people. This is central to the existence of private schools. Private schools can subscribe to a particular set of values shared by a particular community whereas it is argued that public schools cannot support a particular set of values especially if these are in conflict with the values that the State advocates. Moreover, it is argued that, although public schools do fulfil the role of transmitting values, the emphasis is on the transmission of common values and invariably the values and ideology of the dominant group (see for example section 2.2.3.2). Therefore, in public schools, the State is able to exercise its control over the content of values. This is achieved through the formal and hidden curriculum, the nature of school organisation and even through teacher training. It is further argued that in public schools, families are denied any significant say or influence over their children's socialisation within the school and their values formation. This is evident from the fact that, traditionally parents have had little or no say over curriculum matters such as the content of subject matter that is taught and the selection of textbooks, except for their right to withdraw their children from religious education classes. For the most part parents in South Africa are conveniently kept in the dark about formal curriculum matters and have even less influence over the hidden curriculum.

#### **3.4.4 Autonomy**

A primary feature of private schools is their apparent autonomy. Private schools have sought to be as independent as possible from state control and regulation, and to have the power to determine their own policies, actions, decisions and behaviours. For example, private schools have wide control over admission policies, staff appointments, discipline and the management of the instructional programme. The notion of decentralised control and autonomy is once again in keeping with the liberal philosophy that state involvement and intervention should be kept to a minimum. A number of advantages of autonomy, self-regulation and decentralised control are given. For instance, it is argued that by being less encumbered by state control and bureaucratic constraints, private schools are able to advance more quickly, to be innovative and respond to change more efficiently and effectively. Self-regulation also enables schools to define their own needs and how best to meet these needs. However, while the power of authority and control has shifted from the state to the governing body of private schools, private schools in general are not completely autonomous and independent. In most countries, private schools have to function within the parameters set by the State which vary between different countries.

#### **3.4.5 Pedagogical interests**

A frequent argument for choosing private education and establishing private schools is that the quality of education experiences gained in a private school are perceived to be more superior than state schools. Rightly or wrongly, private education has become associated with quality education. Although there is little conclusive research to support this claim, in general, private schools are considered to have better resources to provide a high standard of education. Private schools are seen as establishing a benchmark against which standards in the public school can be assessed and maintained. Similarly, Weiss and Mattern (1989:153) suggest that private schools are a natural terrain for pedagogical experimentation and this sets the pace for pedagogical progress from which the public school system benefits.

Educational aspects of private schools that appeal to parents are the facilities, small class sizes, varied curricula, favourable examination results and good



discipline. Many private schools use class size to promote their school. For example, Michaelhouse (Natal) provides 'small classes that provide the ideal opportunity for committed teachers' and St Andrews (Senderwood) advises that 'classes do not exceed 25 and education is child-centred' (Private School Portfolio 1995:14; 20). Although there is little conclusive research to show any significant difference in the quality of education in class sizes of 15 or 25, parents do feel that their children will be given more individualised instruction when the ratio is 1:20, compared with 1:35 and 1:40 in state schools, and that the interaction between the teacher and pupils will not decline as one expects in large classes.

Private schools also tend to follow innovative programmes of study and are more free to experiment with different teaching strategies. They can experiment with the curriculum and develop study material (including books) according to their own principles and educational philosophy whereas state schools have less control and influence over the curriculum. Private schools are also often able to offer a more varied educational programme and cater for specialised needs. This is linked to the fact that private schools are able to employ specialist teachers and are not necessarily limited in the number of teachers they can appoint. Good facilities, equipment and resources further contribute to stimulating teaching and learning environments in private schools. Although this varies considerably amongst private schools, a survey of private school yearbooks and prospectuses shows many private schools situated in sprawling parkland areas with high-tech facilities.

Although there is no conclusive evidence to support the notion of quality, surveys of South African private schools point to the quality of education that is achieved in some private schools. For example, in the 1991 matriculation examinations, private schools in Soweto outperformed state schools by considerable margins and in 1992, 20 private schools were listed among the 100 schools with the best performance (Henning 1993:10-11). The only detailed study of private schools conducted so far is that of the Human Sciences Research Council.<sup>11</sup> The findings reported the following advantages of private schools (Henning 1993:12):

- (a) Pupils from private schools did better in respect of academic achievements than their provincial counterparts.
- (b) Private school pupils tended to have a more positive attitude towards their homework.
- (c) Private school pupils received more assistance from teachers in planning their work.
- (d) Classes were generally smaller in private schools.
- (e) More private school pupils aspired to gain entrance to university.
- (f) Private school pupils had a more positive attitude towards religion.
- (g) Private school pupils spent more time on cultural and extracurricular activities.

Although the above report does not present a conclusive case for private schools, it does highlight some of the important ingredients, like small classes and positive attitudes, that inevitably contribute to good quality education. However, there is a great variation among private schools in terms of the quality of education they offer. Not all private schools have superior resources and facilities to provide a top quality education.

In addition to the quest for quality education, Markland (1989:615) points out that private schools come into being as a desire to provide for alternate educational practices or to meet needs that are not adequately provided for in the state sector. Many private schools have been established to provide a particular type of education or special needs. There are those which specifically follow a traditional education programme which emphasises certain subjects, while others offer an education based on a particular education philosophy. Good examples of the latter are the Waldorf Schools and Montessori Schools.<sup>12</sup> These schools advance a particular kind of education based on a particular philosophy of teaching and learning. This is demonstrated, for instance, in their curriculum, teaching methods and the way in which the school programme is organised.

Other private schools are also established to provide a suitable education for children with special educational needs. These include schools for the visually and mentally impaired, as well as various remedial schools which offer specialised education programmes aimed at children with different learning

needs. Likewise, some private schools have been established with the purpose of providing education in single-sex schools which is in keeping with the religious and cultural values of certain groups.

#### **3.4.6 Socio-economic considerations**

A further important motive advanced for the choice of private schools relates to socio-economic considerations. It is a widely held belief that private schools offer a better standard of education, which is seen as a ticket to social and economic advancement. Traditionally, private schools have been an important system for social mobility in that a private school education facilitates access to desired positions in the social class hierarchy (Fox 1985:126). It is also believed that private schools provide greater opportunities of securing better employment and advancing to top positions in the workplace. However, while some parents may view this social gain as a positive aspect of private education, others criticise this as a pernicious means of engendering social exclusivity, and further widening the social class gap and social inequality in society. Cookson (1989:68), notes that private school advantage is found in the fact that private school credentials remain with people throughout their lives and can be used to open 'status doors' that have little to do with cognitive achievements, especially if the status of the school is high.

#### **3.4.7 Summary**

The above analysis details a number of reasons that can be advanced for the existence of private schools. First, they provide an alternative system for parents who want their children to be socialised into a particular religious direction. Secondly, private schools are an alternative source of education for those who are dissatisfied with the quality of state schooling. Thirdly, parents might also choose schools on pedagogical grounds. This is usually based on the premise that private schools offer more curricular choice and are expected to perform better in examinations. Although there are compelling arguments that private schools are elitist and selective, there is the counter claim that they are aimed at increasing personal liberty and autonomy. The *raison d'être* for a private school's existence varies. A particular school's reason for being is usually based on a combination of factors. While each of the above factors alone does not

necessarily provide a convincing argument for establishing and choosing private schools, each does contribute to an overarching philosophical position on the need for private schools in a democratic society.

### **3.5 THE STATUS OF PRIVATE EDUCATION IN THE CURRENT SOUTH AFRICAN CONSTITUTIONAL AND LEGAL SYSTEM**

The previous section briefly examined the *philosophical rationale* for the existence of private schools in general. It has already been noted that, in spite of the criticism against private education, the choice of private education is firmly rooted in the law. Both international and national legal documents include provisions which make the establishment of private educational institutions possible. The aim of this section is to examine the *legal* position of private education in South Africa within the constitutional framework in more detail. Although the section is ultimately concerned with private education and the Constitution, this complex issue necessitates a general understanding of the nature, purpose and scope of the Constitution of the Republic of South Africa Act 200 of 1993, specifically the bill of rights. Therefore, the discussion is presented in two parts. The first part begins with an exposition of the current South African constitutional dispensation, which provides the basis for the establishment of private schools. Attention is given to the nature of the Constitution, the scope and application of the bill of rights and the interpretation of the bill of rights. This is followed by a discussion on the legal position of private education in South Africa within the 1993 constitutional framework. The main purpose of this section is to discuss the establishment of private schools in terms of the Constitution and the application of the bill of rights to private schools.

#### **3.5.1 The scope and nature of the Constitution of the Republic of South Africa Act 200 of 1993**

The Constitution is an extremely important piece of legislation since it signals a new and significant period in South African constitutional history. The Constitution forms the foundation for all other laws, including education law, and thus has a direct bearing on the education system. Before examining the application and scope of the Constitution to private education, it is necessary to

first have a general understanding of the nature and scope of the South African Constitution.<sup>13</sup>

#### 3.5.1.1 The Constitution is the supreme law

The 1993 Constitution is a particularly important document since it represents South Africa's first democratically elected government. A significant feature of the 1993 Constitution is that it ranks as the supreme law of the land.<sup>14</sup> This means that no law, not even an Act of Parliament, ranks higher in status. This principle of constitutionality marks a radical departure from the constitutional dispensation of the past according to which Parliament reigned supreme (Basson 1994:7). The Constitution provides the legal framework for making all laws at national and provincial level. It specifies and defines the structures and organisation of government, and outlines the powers and duties of its organs and principal officials. It governs the relationship between one government authority and another, as well as between government and citizens. Moreover, it binds all levels of government (section 4).

#### 3.5.1.2 The Constitution is entrenched

The Constitution is entrenched and rigid, which means that it cannot be changed easily. A two-thirds majority of all members of the National Assembly and the Senate is required to amend the Constitution.

#### 3.5.1.3 Constitutional values

Carpenter (1987:8) defines a constitution as 'a body of fundamental principles according to which a state is governed'. The constitutional values embodied in the 1993 Constitution reflect the changing nature of South African society and the commitment to a non-racial and equal society. According to Botha (1994:241), constitutional values are the ideals to which a political community has committed itself. Botha (1994:237) asserts that the values and principles embodied in the 1993 Constitution have their source and origin in the history and experiences of South African society. The document is a response to the paternalism, authoritarianism and racial exclusivity which characterised past constitutional practices. The Constitution is also rooted in international human rights documents, incorporating international norms and standards. The

underlying values of the 1993 Constitution as described by Botha (1994:241-243) are national unity, limited government, liberty and equality and pluralism. These values form the background against which the Constitution and all other laws are to be interpreted and applied.

*(a) National unity*

The preamble to the Constitution refers to the need for 'the promotion of national unity'. The Constitution seeks to overcome the divisions of the past and to work towards creating national unity. It thus provides a framework for social reconstruction and reconciliation. To this end, the process of *integration* is essential, which, according to Botha (1994:241), embraces a legal and social component. Legal integration refers to the establishment of a constitutional framework that applies to the whole country and which sets uniform standards. This is achieved by means of the central government having power to impose national standards and constitutional norms and values to which all law must conform. Social integration is concerned with the building up of a nation based on shared values and a common identity, and a recognition that all South Africans are inextricably bound.

*(b) Limited government*

The 1993 Constitution seeks to ensure government which is open and restricted. To this end, government power is limited through the separation of powers, an independent judiciary, individual rights, democratic accountability and an independent civil society (Botha 1994:242). This is an important principle, given the history of parliamentary supremacy in South Africa, which gave the apartheid government virtually unlimited power to exercise its control and influence over the people.

*(c) Liberty and equality*

Likewise, the principles of liberty and equality are of particular importance in South Africa where the previous constitutional system rested upon the foundation of inequality and discriminatory laws, which systematically deprived the majority of the population of their freedom. These principles are given expression in the

bill of rights, which seeks to protect and promote basic human rights which include freedom and equality.

*(d) Pluralism*

The 1993 Constitution attempts to accommodate a plurality of values and interests. According to Botha (1994:242), national unity is promoted on the basis of political and cultural pluralism. Political pluralism refers to the existence of a wide range of interest groups holding diverse opinions and beliefs.

*(e) Implications for the education system*

The values embodied in the Constitution are important for the development of a new education system. The goals of achieving national unity, democracy, liberty and equality are not the task of government alone. It is envisaged that all sectors of society contribute to these societal goals, including the education sector (both public and private). For instance, in the White Paper on Education and Training (South Africa. DNE 1995:12), it is emphasised that a fundamental aim of the new education system is reconstruction and development, and the realisation of democracy, liberty, equality and justice. Historically, South African education has been unequal and undemocratic insofar as it has been based on racial discrimination. The nature and structure of the education system during the apartheid era mirrored and reproduced inequalities and injustices in society. It is thus inevitable that the restructuring of the education system as a whole, including the private sector, must be aimed at addressing the critical issues of liberty, equality and justice (see chapter 2).

3.5.1.4 The bill of rights

Chapter three of the Constitution is one of the most important sections because it contains the bill of rights. The scope and nature of the bill of rights is discussed in more detail in section 3.5.2, but at this juncture it is important to provide information on the interpretation clause.

### 3.5.1.5 The interpretation clause

The interpretation clause is of paramount importance. In the past, South African courts by and large followed a narrow, restrictive approach to interpretation. However, in contrast, section 35 (the interpretation clause) provides that:

In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

Section 35(3) states further that:

In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter (three).

This clause now gives new direction to interpretation and clear support for a purposive, contextual approach. In other words, when interpreting the bill of rights, the courts are obliged to consider the context in which the Constitution was developed. This is significant for the application of the bill of rights because although there is no explicit mention of the private sphere, judges are expected to take cognisance of the constitutional values and the provisions of the bill of rights when interpreting all law which includes private law.

### 3.5.1.6 The limitation clause

Although there has been some opposition to the inclusion of a limitation clause, Du Plessis and Corder (1994:123) point out that such a clause is not uncommon and is within international custom and practice<sup>15</sup> since it is generally accepted that human rights are not absolute. Kleyn and Viljoen (1996:247) note that the formulation of a right itself may impose a limitation. For example, section 8(2) which provides that no 'unfair discrimination' will be tolerated implies that some forms may be regarded as fair, such as, children under 18 not being allowed to vote.



### **3.5.2 The scope and application of the South African bill of rights**

Unlike many other countries, South Africa, until now, has never had a bill of rights, even though the matter of human rights has featured prominently on the political agenda since the early 1900s. South African constitutional history reveals consistent patterns of resistance and hostility to the notion of human rights (Dugard 1990:363). Prior to and after the formation of the Union in 1910 no serious attention was given to the issue of human rights or the need for a bill of rights to protect individual freedoms. The new wave of international interest in human rights that emerged after the Second World War, which gave rise to the United Nations Charter for Human Rights (1945) and a series of other international human rights documents, had little impact on the South African government. However, in 1943, the African National Congress responded with a document on African Claims in South Africa, which included a bill of rights which called for one person one vote, equal justice in the courts, freedom of land ownership and the repeal of pass laws (Du Plessis & Corder 1994:25). This bill of rights was, however, dismissed by the South African government.

According to Dugard (1990:360), the National Party that came into power in 1948 also refused to identify with the broad goals of the international community set out in the United Nations Declaration of Human Rights (1948) and took no positive part in the development of human rights on account of the policy of apartheid. Any acceptance of the international human rights documents would have thwarted their segregationists policies, which were an antithesis of the goals of the international community. The discriminatory legislation enacted in the 1950s disregarded basic human rights and emphasised the extent to which individual liberties were at the mercy of Parliament (Dugard 1990:361). In 1955, in reaction to the National Party's persistent neglect of human rights, the Congress of People, an alliance of the African National Congress (ANC) and other political organisations representing all population groups in South Africa, adopted the Freedom Charter (1955), which affirmed the demand for human rights. Following the formation of the Republic in 1960, new demands were made for a bill of rights but this was again rejected by the National Party of the day. In 1983 the issue of human rights and the adoption of a bill of rights again featured prominently in public debate, but once again, the Constitution of the Republic of South Africa Act 110 of 1983, which entrenched the government's policy of

segregation, had no bill of rights in spite of increasing internal and external pressure on the government to address the issue and commit itself to international observances. During the years leading up to the first democratic elections of 1994, it was inevitable that the adoption of a bill of rights should remain high on the agenda. During this period nearly all the major political parties put forward proposals for a bill of rights. The ANC's Freedom Charter was supplemented in 1988 with their Constitutional Guidelines for a Democratic South Africa and in 1990 the ANC published a document entitled A Bill of Rights for a New South Africa.

#### 3.5.2.1 Content of the bill of rights

The bill of rights consists of 29 provisions which guarantee a range of basic fundamental rights and freedoms, such as life, liberty, privacy, dignity, as well as the right to education, to own property and to lawful administrative justice. The bill of rights is primarily aimed at the protection of these rights against improper State interference. Appendix C contains extracts from chapter three of the 1993 Constitution and chapter two of the 1996 Constitution for purposes of cross-reference (see also section 6.3.6).

#### 3.5.2.2 The vertical and horizontal application of the bill of rights

Perhaps the most contentious issue about the bill of rights is the question of application, more specifically whether it should have vertical and horizontal application. Ordinarily, a constitution serves to identify government institutions and define their powers. It does not deal with the relations among private persons. Likewise, human rights were initially aimed at protecting individuals from state power (Kleyn & Viljoen 1996:236). In other words, the bill of rights applies to relationships between the State and citizens, that is, the vertical application (as noted in chapter 1) as opposed to the horizontal application between private institutions or individuals (eg, private schools which is discussed later).

In South Africa, the question whether the bill of rights has, or should have, vertical and horizontal application is also a matter of contention. The South

African Law Commission's second report on group and human rights suggested that the proposed bill of rights operate in the vertical sphere only:

The premise in the Commission's proposed bill of rights is that it regulates the 'vertical' relation between State and subject.

The ANC, on the other hand, included several clauses in its proposed bill of rights that provided for the horizontal application:

All private bodies, along with the State and public institutions are mandated to prevent any form of incitement to racial, religious or linguistic hostility and to dismantle all structures and do away with all practices that compulsorily divide the population on grounds of race, colour, language or creed (Art 14 par 3).

The arguments for and against the horizontal application of the South African bill of rights are summarised by Van der Vyver (1994:387-388). The main arguments advanced by spokespersons of the ANC in favour of subjecting the entire body of the South African law to the bill of rights:

- The Constitution is the *Grundnorm* of the South African legal system and should therefore regulate all laws, including private law.
- The private sphere should be prevented from perpetuating discriminatory practices.
- Financial measures (eg, absence of state subsidies) to discourage discriminatory practices in the private sphere may not be sufficient.

The arguments for excluding the universal application of the bill of rights are:

- Historically, a bill of rights was designed to restrict the exercise of government powers.

- The constitution is a legal document defining and confining the powers of government, likewise a bill of rights ought to address government powers only.
- Excessive control by the State of purely private matters would result in a totalitarian regime.

The Constitution drafters had to give due consideration to the different viewpoints. During the drafting of the bill of rights, some advocated the horizontal application while others cautioned against this.<sup>16</sup> According to Du Plessis and Corder (1994:112), the Technical Committee finally decided that the chapter should operate vertically only but that provision be made for a seepage to horizontal relationships. Hence the clause 'shall .. bind, where just and equitable, other persons and bodies' was omitted in the final draft and, in fact, no direct or explicit reference to the horizontal application was to be made in section 7 of the Constitution, which states the following:

7(1) This Chapter shall bind all legislative and executive organs of state at all levels of government.

7(2) This Chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.

7(3) Juristic persons shall be entitled to the rights contained in this chapter where, and to the extent of the nature of the rights permits.

The vertical application of the Constitution is therefore predominant. This provision binds bodies and functionaries of the State but cannot be invoked to compel private bodies or persons to such conduct that is conducive to the aims and objects entrenched in it (Du Plessis & Corder 1994:111). It can be argued that section 7 makes a comprehensive statement about the application of the bill of rights and that the bill of rights which sets out a range of rights and freedoms held by private persons only acts to restrict the powers of government over such persons. However, this provision does not necessarily rule out non-governmental institutions. This provision is complex and in order to elucidate its meaning it is necessary to discuss the concepts 'all levels of government' and 'organs of state' in more detail. It is clear from section 7(1) that the bill of rights applies to all

'organs of state' on all levels of government. First, the 'levels of government' refer to the national, provincial and local levels of government. The meaning of government can also be problematic. For the purpose of this provision, the bill of rights applies to the legislative and executive branches and not the judiciary.<sup>17</sup> Secondly, in terms of this provision it is important to know what constitutes an 'organ of state' in order to understand the scope of the bill of rights.

According to Du Plessis and Corder (1994:110), the concept 'organ of state' includes any statutory body or functionary. The following are examples of statutory bodies which are considered to be organs of state for the purpose of applying the bill of rights (ie, chapter three):

- (a) Bodies established by statute as organs of government, for example, the National Council on Indemnity.
- (b) Bodies or institutions established by statute but managed and maintained mainly through private initiative, for example, universities and the controlling bodies of professions, such as law societies. These bodies will qualify as organs of state because they fulfil public functions, depend on infrastructure support from the State and therefore function in close cooperation with the structures of State authority.
- (c) Private bodies or institutions not established by any statute, but fulfilling certain key functions under the supervision of organs of state, for example, the Aged Persons Act 81 of 1967 which provided for the registration of private homes for the aged and subjects these homes to inspection by social welfare officers (which are government officials). Bodies in this category could be classified as executive organs of state for the purpose of section 7(1) to the extent that they function under the supervision of the State.
- (d) Private companies incorporated under the Companies Act.

The above categories suggest that even private bodies, such as private schools, can be subjected to chapter three of the Constitution. Some also argue that section 7(2) which provides that the chapter 'shall apply to all law in force and all

administrative decisions and acts performed during the period of operation' gives rise to the horizontal application of chapter three in so far as it is applicable to 'all law in force' which must include private law. Du Plessis and Corder (1994:116) refute this view which they criticise as being based on a literalist and technicist reading of section 7(2). Instead, they argue that section 7(2) cannot be read in isolation from section 7(1) which clearly refers to laws (statutory, common and customary law) regulating the relationships defined in section 7(1) which are relationships between the State and its subjects, and these are vertical relationships.

However, this does not preclude conditional horizontal application. While no direct provision is made for the horizontal application, section 35(3), which is part of the interpretation clause, provides for 'horizontal seepage' or indirect horizontality.<sup>18</sup> This section states that 'in the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter'. This means that all existing law, including private law, is open to being influenced and shaped by the values enshrined in chapter three, albeit by way of a 'seepage' of the provisions of the chapter into horizontal relationships. Van der Vyver (1994:379), also points out that section 33(4) which states that 'this Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7(1) provides another means of horizontal seepage'. Van Aswegen (1995:51-52) also argues that a degree of horizontal application of a bill of rights is a *fait accompli* in modern constitutional law and forms part of chapter three of the 1993 Constitution. According to Van Aswegen (1995:56-57), section 35(3) (the interpretation clause), is an express adoption of the German model of *Drittwirkung* in South African law (see section 3.5.2.5(a)) and explicitly provides for the indirect horizontal application of the bill of rights. The issue of the horizontal and vertical application of the bill of rights has also been dealt with extensively in recent case law, which is discussed next.

### 3.5.2.3 South African case law

To date, conflicting opinions on the scope and application of the bill of rights have emerged from the courts. Some decisions strongly support a direct horizontal application, which is more than a 'seepage' effect or indirect application, while

others have favoured a predominantly vertical application. In the landmark case of *Baloro and Others v University of Bophuthatswana and Others*,<sup>19</sup> the applicants contended that they were being unfairly discriminated against on the grounds of their nationality and origin and made the legal submission that the respondents infringed their basic rights as contained in chapter three of the Constitution. They submitted that the moratorium on promotions was discriminatory and unlawful. However, in reply to the applicants' affidavit, the second respondent denied that the promotions of the applicants were being thwarted by virtue of their place of origin (209C) and asserted that section 8 of the Constitution is not relevant to the matter in that the fundamental rights only binds the organs of state (section 7) and therefore does not bind the first respondent who is an entirely independent party (209D-E), in other words that the bill of rights can only be applied vertically.

The court rejected the argument that the Constitution has vertical application only. With extensive reference to foreign law, South African law and legal commentary, Friedman JP concluded that the Constitution does make provision for horizontal application. He contended that even if it can be argued that [the University] is a private institution, or should it become a private institution with no State control or influence over it, the horizontal dimension of the fundamental rights would be applicable to it, because of the nature of its activities and its operation in the public domain as an important institution of learning (246G) (see *McKinney* decision in section 3.5.2.5(c)). He concluded that the demonstrations against the 'expatriates' and the decision of the Interim Council of the university to place a moratorium on promotions of expatriates while promoting South African nationals were a gross violation of section 8(2) of the Constitution.<sup>20</sup> In his deliberations, Friedman argued strongly for the horizontal application of the bill of rights. He noted that in applying the vertical application only, the Constitution would only protect fundamental freedoms and rights against invasion by the State and not from the abuse of neighbours and fellow citizens. This means that private power remains unrestrained. In his view, it could not have been the intention of the Constitutional drafters to combat discrimination on the level of State only, and allow it to continue and proliferate on other levels. Friedman does recognise, however, that the horizontal application is not unconditional and

needs qualification. According to Friedman, the bill of rights applies to the following 'non-state' spheres:

- (i) Corporations, multinational and local companies engaged in trade, commerce, businesses that deal with the public, have employees, engage in numerous undertakings. This category is subject to the fundamental rights in all their operations because they deal with the public and are generally no different in power, wealth or influence from State or parastatal companies, or statutory bodies.
- (ii) Commercial and professional firms which rely on the public for their support and custom, and who by the nature of their activities engage with the public.
- (iii) Hotels, restaurants, places of public entertainment, ie all of which rely on public patronage. Persons cannot be refused admission on grounds of race, colour, creed or gender, etc. This would constitute discrimination in terms of section 8 of the Constitution.
- (iv) Private hospitals, rehabilitation centres, clinics engaging with the public as patients, etc. Public hospitals funded by the State or provinces are clearly 'organs of state'.
- (v) *Private universities, schools, institutions of learning funded by individuals and corporations, which operate in the public domain (italics added)*.
- (vi) Sports grounds and clubs which are open to the public.

A similar approach was followed in *Mandela v Falati*,<sup>21</sup> which dealt with the right to freedom of speech. Although the court did not draw a distinction between direct and indirect horizontality, Van Schalkwyk J held that the right to freedom of expression in chapter three is of horizontal application. He stated that:

The rights especially protected under subpara (bb) include the right of freedom of expression (s 15) "... insofar as such right relates to free and fair political activity". Political activity occurs not only between the State and its organs and the citizenry, ie vertically, but also, and more especially, between citizen and citizen, which is the level at which all political contests are fought. The drafters of the Constitution must therefore have envisaged that the rights necessary to conduct such activity could be enforced between individuals.



Likewise in *Motala and Another v University of Natal*<sup>22</sup> the court held that the provisions in sections 8(1), 8(2) and 32 of the Constitution have direct horizontal application. The court held that while some provision of the bill of rights are by their very nature exclusively vertical in their application, others are enforceable not only against the State or its organs but also against individuals, natural or juristic.

Some judges have taken a different point of view. For instance, the *De Klerk and Another v Du Plessis and Others*<sup>23</sup> case is illustrative of the view that the bill of rights is intended to be of vertical application only.<sup>24</sup> In delivering his judgment, Van Dijkhorst J contended that 'nowhere does the Constitution contain an explicit provision that the provisions of chapter three have application to disputes between private citizens. Had this been intended it would have been stated clearly as that would not fit in with the traditional role of a bill of rights' (132D). He disagreed with the judgment in the *Mandela v Falati* case stating that 'the conclusion is a *non sequitur*'. He stated that:

I cannot imagine that the drafters of the Constitution intended the whole body of our private law to become unsettled. Are we to see the invasion of private property justified by the trespasser on the strength of the right to freedom of movement (s 18) or the right to freely choose a place of residence anywhere in the national territory (s 19)? Surely this was not intended. There was no need for constitutional invasion of private law. Parliament is empowered to alter existing law wherever the shoe pinches. In cases where the rights are not merely bland and vaguely stated, the example of conduct which is considered unacceptable is always conduct by the public authorities. Sections 11, 13, 14(2), 15, 23 and 28(3) are examples. All rights and freedoms enacted in chap 3 are clearly of vertical application only.

Van Dijkhorst J concluded by stating that:

The rule is that fundamental rights and freedoms are protected against State authority only. Horizontal protection sometimes occurs to a limited extent but when it is intended over the broad field of human rights, it is expressly so stated (131C).

The conflicting views expounded by the courts have to some extent been clarified by the Constitutional Court in *Du Plessis v De Klerk*<sup>25</sup> in terms of which the majority held that the bill of rights applies directly to private law disputes in which there is an aspect of state involvement. However, it was further held that the exclusion of the judiciary from section 7(1) read with sections 33(4) and 35(3) precludes an inference of direct horizontality (682-683).

While it is legally accepted that a constitution applies to the public law domain, the South African courts are less reluctant to draw a rigid line between the public and private domain when it comes to the advancement and protection of basic human rights. The 1993 Constitution places emphasis on a purposive approach to interpretation that will promote the fundamental principles of freedom, equality and justice for all people which means that the courts need to give due consideration to the horizontal application of the bill of rights. This approach reflects a shift in the philosophical conception of a bill of rights from a strictly libertarian view that is mainly concerned with the rights and freedoms of the individual and a communitarian view that is concerned with the collective community rather than the individual.<sup>26</sup>

#### 3.5.2.4 Summary

Traditionally, a bill of rights has been created to restrict government interference in the lives of individuals. It is rooted in the liberal philosophy which holds that unrestrained government power is a threat to individual freedom and autonomy. This libertarian approach thus emphasises the interests and well-being of the *individual* above that of the State. And while the role of the State in protecting rights and freedoms is important, the level of State intervention must be minimal. Thus, according to Du Plessis (1996:450), libertarians favour a bill of rights focused on individual liberty rather than equality and in respect of state authority versus individual autonomy, they adopt a 'hands-off' approach. However, in a society such as South Africa, it has become equally important to provide a bill of rights that is aimed at restoring *society* as a whole and to lay down basic principles that operate within the public and private domains. This is based on the premise that the violation of people's rights and abuse of power can just as easily come from the private domain as the public. Moreover, while there is a conscious need to limit state control and power, which has been abused in the

past, it is equally important not to be 'blind to the threat of unchecked private power and to the role of government as a promoter of liberty particularly for the disadvantage and oppressed' (Hutchinson & Petter 1988:284). This is especially true of South Africa. Therefore, although the South African bill of rights is based on a classical liberal approach to human rights, it does reflect a particular vision of society and social justice that takes into account past and present social and political circumstances. In terms of a communitarian approach, the bill of rights is viewed as an important instrument for promoting equality and fighting against discrimination, oppression and injustice in both the public and private domain. Moreover, unlike the purely liberal approach which emphasises the rights of the individual, the communitarian approach is concerned more with collective rights and giving priority to the needs of the community as a whole. In view of this, there is a need to balance the value of providing for and protecting individual rights (private domain) and the value of establishing a common foundation on which to reconstruct and unite a divided and unequal society. Therefore, those advancing a communitarian approach seem to prefer equality as a core value while maintaining some 'liberal values' but tolerate state intervention to the extent that is necessary to help distribute material means among the people. This view is in keeping with the wording and spirit of the preamble and bill of rights which states the following:

Whereas there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms.

This is echoed by Mohammed in *Shabalala and Others v Attorney-General, Transvaal and Another*<sup>27</sup> in which he states that:

The Constitution contains, in material respects, a new fundamental commitment to human rights and is not merely a contemporisation and incremental articulation of previously accepted and entrenched values shared in our society.

From the discussion so far it is clear that the issue of application is far from being resolved. As Mbao (1996:45) points out, although a number of cases have come before the courts, a definitive judgment is yet to be delivered on the question of the application of the bill of rights. However, while the vertical application is predominant, Mbao (1996:44) notes that the weight of the authority is on a broad and purposive approach under which the Constitution is to be interpreted in such a manner as to promote the values which underlie an open democratic society. Therefore, in keeping with the spirit of national unity, reconciliation and restructuring society, the bill of rights may well be applied horizontally. The position is aptly summed by Froneman J in *Gardner v Whitaker*<sup>28</sup> in which he states that:

there is no uniform and single answer to the question whether an alleged breach of a fundamental right contained in chapter 3 of the constitution can be found in an action between private individuals and entities, or whether it only applies between individuals and State organs. It all depends on the nature and extent of the particular right, the values that underlie it, and the context in which the alleged breach of the right occurs (684H-685F).

### 3.5.2.5 Comparative international perspectives on the application of bills of rights

The problem of determining the scope of application of bills of rights is not confined to South African jurisprudence, but is a matter which has been the subject of world-wide debate for many decades. By way of comparison, a brief discussion on comparative international trends provide useful and enlightening material.

#### (a) Germany

According to Van der Vyver (1994:379), in German jurisprudence, for instance, the issue has also focused on whether basic rights apply in state-subject relations (public law) only or should they also be taken to regulate subject-subject (private law) relations. As a general rule, the bill of rights in the Basic Law of Germany (1949) has been held to have mediate (indirect) and not immediate (direct) *Drittwirkung*. In other words, the constitutional restraints apply to legislative and administrative powers of government in the field of state-subject

(public law) relations only; but when interpreting *all legislation*, including statutory law regulating private law matters, German courts are required to take cognisance of the provisions of the bill of rights and, as far as possible, to give legislation a meaning that is consistent with the basic values that are embodied in the Basic Law. Therefore, as in the case of South African law, the bill of rights has mainly vertical application and in certain instances horizontal application. However, an exception in the Basic Law is article 9(3) which applies directly to the private law sphere. This article guarantees freedom of association in the context of labour relations and expressly provides that any 'agreements which restrict or seek to hinder this right are null and void; measures directed to this end are illegal'. This article includes all public and private persons and groups.

*(b) United States*

In the United States, the Constitution designates and determines the relationships of citizens to the government rather than to each other, and restricts government conduct. Furthermore, most of the protection of individual rights and liberties enshrined in the Constitution and bill of rights applies only to the actions of government agencies. In other words, it is confined to the public sphere. Private institution and individual actions and conduct are not proscribed by the Constitution (Chemerinsky 1989:274-275). Instead, the USA has included the horizontal application of human rights principles in a series of Civil Rights Acts (Van der Vyver 1994:380). The exceptions are the First Amendment (which deals with the principle of liberty) and the Fourteenth Amendment (which prohibits discrimination), which apply to the private sphere without there being a need for state action. If the rights contained in the Constitution are to be extended to private relations, and invoked in litigation involving private bodies or persons, 'state action' (ie, government conduct) is required. Thus, according to Van der Vyver (1994:279), in the USA, one is not dealing with the distinction between public law and private law, but in terms of 'state action'. In other words, in resolving constitutional matters relating to the rights and freedoms of individuals, it has to be decided if there is any state involvement which will enable the courts to apply the norms embodied in the Constitution and the bill of rights. State action cases concern three questions: (1) whether an activity is a 'public function'; (2) whether the government is so significantly involved with the private actor as to make the government responsible for the private conduct and (3)

whether the government may be said to have approved or authorised the challenged conduct sufficiently to be responsible for it. The 'state action' doctrine is illustrated in the US case of *Burton v Wilmington Parking Authority*,<sup>29</sup> in which the refusal of a private restaurant owner to serve black customers was declared unconstitutional. In this case, 'state action' consisted in the state's having rented space in a state-owned parking lot to the owner.

(c) *Canada*

In Canada, the application of the Canadian Charter of Rights and Freedoms is dealt with in section 32(1) which states that:<sup>30</sup>

this charter applies (a) to the Parliament and Government of Canada in respect of all matters within the territory of Parliament, including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

This section makes provision only for the vertical application of the Charter. It also applies only to the legislative and executive organs of government and not to the judiciary. This position was confirmed in the Canadian case of *Retail, Wholesale and Department Store Union Local 580 v Dolphin Delivery*,<sup>31</sup> in which the Supreme Court of Canada rejected the theory of general application of the Charter to private law relations. The Court held that the Charter did not apply as the case involved private parties and there was no governmental action (Tasse 1989:69).<sup>32</sup> However, Tasse (1989:97) also points out that the decision in *Dolphin Delivery* does not completely exclude the application of the Charter to private law relations. Mr Justice McIntyre recognises the applications of the Charter to such relations '[w]here such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the Charter rights of another'.

Further evidence of the vertical application only is found in the case of *Re McKinney and Board of Governors of the University of Guelph*,<sup>33</sup> which differs from the decision taken in the *Baloro* case. In the *McKinney* case, the court concluded that the Charter does not bind the Ontario private universities thereby

confirming the prevailing wisdom that the Charter applies to the public law sphere (Tasse 1989:85). In delivering his judgment, Justice Grey made the following comments:

I have had regard to the nature of universities, the extent to which they are created and regulated by statute, the nature of the relationship between the universities and the elected and executive branches of government, and the nature of the function or role the university play in public life of the province. In my view, the 'governmental function', 'governmental control' and 'state action' or 'nexus' which links the essentially private universities with the province is insufficient to invoke s 32(10)(b) of the Charter.

*(d) Namibia*

Closer to South Africa, the operation of the rights and freedoms enshrined in the Namibian Constitution is both vertical and horizontal. According to article 5 of the Republic of Namibia Constitution of 1990, which deals with the protection of fundamental rights and freedoms:

The fundamental rights and freedoms enshrined in the chapter shall be respected and upheld by the executive, legislative and judiciary and all organs of the government and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the courts in the manner hereinafter prescribed.

From the discussion so far, it is evident that there is no single answer or solution to the question of vertical and horizontal application. Although the application of the bills of rights to state-subject relations prevails, the horizontal application is applied with caution, and usually on a case-by-case approach. The horizontal application of bills of rights is generally dependent on the presence of state regulation, state support or state funding.

#### 3.5.2.6 Summary

To summarise, the Constitution of the Republic of South Africa Act 200 of 1993 represents a departure from previous constitutional practices. The basic underlying principles and the inclusion of a bill of rights (chapter three) present

new constitutional challenges. A challenge to the courts is to constantly balance the interests of the private individual or body with the collective interest of civil society. The application, interpretation and limitation of the bill of rights has important implications for private education, to which the discussion now turns.

### **3.5.3 The status of private education within the new South African constitutional dispensation**

The preceding discussion focused on the issue of whether a bill of rights should apply to both the private and public sphere of law. The question that is now addressed is how this is relevant to private education. In the discussion that follows, attention is given to the relationship between the Constitution and private education with regard to the establishment of private schools and the application of the bill of rights.

#### **3.5.3.1 The right to establish private schools**

It is an ongoing *political* debate whether private schools should be allowed to exist. It has already been mentioned earlier in the chapter that, on the one hand, there are the proponents of private schools who claim a right to choose private education and, on the other, there are those who view private education as elitist and detrimental to the advancement of equal education and social equality. However, private schools have existed for a long time and in spite of the arguments advanced by the opponents of private education, constitutional and statutory law formally acknowledge the right of parents to determine their children's education and to choose private schools.

In South Africa, the existence of private schools has been given legal impetus by the 1993 Constitution. Section 32 of the bill of rights, dealing with education, states:

Every person shall have the right to -

- (a) basic education and equal access to educational institutions
- (b) instruction in the language of his or her choice where this is reasonably practical; and



- (c) establish, where practicable, educational institutions based on a common culture, language or religion, provided there shall be no discrimination on the ground of race.

This provision clearly provides for the right to education, the right to equal access to educational institutions, the right to education in one's own language, which is essential in a multi-lingual society, and the freedom of choice such as the choice between different public schools, the choice between private and public schools and the choice to be educated according to one's own religious and philosophical beliefs. Although not expressly stated, the right to establish private schools is thus also protected by section 32(c).<sup>34</sup>

#### 3.5.3.2 Comparative international analysis

The constitutional and statutory protection of the establishment of private schools in South Africa is in keeping with international trends. Most democratic countries allow private schools to operate. As already discussed in sections 3.4.1 and 3.4.2, the choice of private education is viewed as a fundamental democratic right based, inter alia, on the freedom of association and choice, and religious freedom.

##### *(a) International treaties*

The legal right to establish, operate and attend private educational institutions is enshrined in various international treaties such as the Universal Declaration of Human Rights (1948), the United Nations Convention against Discrimination in Education (1960), the International Covenant on Economic, Social and Cultural Rights (1966) and the European Convention on Human Rights (1950).

Although the Universal Declaration of Human Rights does not specifically mention the word 'private institution', article 26(3), which provides that parents have a *prior* right to choose the kind of education they wish to give their children, can be interpreted to include the choice of private schooling, especially where this is intended to allow parents to steer their children's education in a particular religious direction which is protected in article 18.

The United Nations Convention against Discrimination in Education (1948) is more explicit. According to Article 2(b):

The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents and legal guardians, if participation in such systems or attendance at such institutions is optional and if the education conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

In article 2(b) it is assumed that schools established on the grounds of language and religion may also include private institutions, which enable parents to again choose the kind of education they wish their children to receive. Article 2(c), however, makes further direct reference to private institutions. It states that:

The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities ...

A similar provision is contained in the International Covenant on Economic, Social and Cultural Rights (1966). Article 13 recognises the right of everyone to education and places a duty on states to provide an adequate system of schools to meet this right. Article 13(3), however, states that:

The States Parties (sic) to the present Covenant undertake to have respect for the *liberty* of parents and, when applicable, legal guardians to choose for their children schools, *other than those established by public authorities*, which conform with *minimum* educational standards as may be laid down or approved by the State and to ensure religious and moral education of their children in conformity with their own convictions (italics added).

The phrase 'other than those [schools] established by public authorities' is a clear reference to the establishment of private schools provided they meet certain basic requirements which would be prescribed by the State for all schools. This provision gives effect to the principle of freedom (liberty) and the right of parents

to determine the kind of school they wish their children to attend and the kind of education they receive. This is given further support in subarticle 4 which states that article (13) cannot be interpreted in such a way that it would 'interfere with the liberty of individuals and bodies to establish and direct educational institutions'.

Article 2 of the First Protocol to the European Convention on Human Rights (1950) provides that:

No person shall be denied the right to education. In exercise of any functions it assumes in relation to education and teaching, the State shall respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

While no direct reference is made to private institutions, it is inferred that parents have the right to choose schools that meet their educational, religious and philosophical needs and preferences whether public or private. This has been confirmed in a number of cases. For instance, in the case of *Kjeldsen, Busk Madsen and Pedersen v Denmark*,<sup>35</sup> the European Court stated that:

...the second sentence of Article 2 must be read together with the first which enshrines the right of everyone to education. It is on this fundamental right that is grafted the right of parents to have respect for their religious and philosophical convictions, and the first sentence *does not distinguish, any more than the second, between State and private schooling* (italics added).

(b) *Domestic constitutions*

In pursuance of such international documents, most of the well-known constitutions contain a provision relating directly or indirectly to the establishment of private schools or at the very least the liberty of parents to choose their children's education which, by implication, includes private education, especially where this is based on religious grounds.<sup>36</sup> Many European countries make provision for the establishment of private educational institutions in their constitutions, which is in keeping with the international obligations contained in the Covenant on Economic, Social and Cultural Rights. A few examples are listed below.

In the German Constitution, for example, article 7(4) states the following:

The right to establish private schools is guaranteed. Private schools, as a substitute for state and municipal schools, shall require the approval of the state and shall be subject to the laws of the *Länder*. Such approval must be given if private schools are not inferior to the state or municipal schools in their educational aims, their facilities and the professional training of their teaching staff, and if segregation of pupils according to the means of the parents is not promoted thereby. Approval must be withheld if the economic and legal position of the teaching staff is not sufficiently assured.<sup>37</sup>

The effect of this provision was to raise the privilege of establishing private schools to a *Grundrecht* (fundamental right) and end the State's one-sided and exclusive responsibility for education. It also guaranteed private schools the same rights of existence and legal protection as state schools (Gellert & Ritter 1985:342-343).

The French Constitution of the Fifth Republic now also guarantees the right to education and allows the general right to set up and operate private educational institutions subject to certain administrative procedures (Cairns & McKeon 1995:118).<sup>38</sup> According to section 13 of the Preamble to the 1946 French Constitution:

The nation guarantees the equal access of children and adults to instruction to professional training, and to culture. The organisation of the free and secular public education at all levels is a duty of the State.

This provision was reaffirmed in the *loi Debre* of 31 December of 1959 which clearly established the principle of freedom of education, including private education (Bell 1992:151-153).

Likewise, article 76 of the Danish Constitution of 1953 states that:

All children of school going age shall be entitled to free instruction in primary schools. Parents or guardians making their own arrangements for their children or wards to receive instruction equivalent to the general primary

school standard shall not be obliged to have their children or wards taught in publicly provided schools.

Thus, according to Article 76, children are not obliged to be taught in public schools as long as they receive an education conforming to the standards required in public schools. Parents who experience conflict between their philosophy or religious convictions and the education in public schools may choose to teach their children at home or enrol them in a private school (Fledelius & Juul 1992:30-32).

In keeping with international trends, Ireland also makes constitutional provision for private schooling. In terms of article 42(1), parents are acknowledged as the primary and natural educators of children and this guarantees 'the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children'. Accordingly, section 42(2) states that:

Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

In Russia, where private education was previously not tolerated, the new Constitution of 1993 makes provision for mandatory basic education which will be provided by the State with the option of private schools. According to section 43(5):

The Russian Federation shall institute federal state educational standards and support various forms of education and self-education.

The phrase 'various forms of education and self-education' is interpreted to include private schools and home schooling. This is supported by the Russian Education Law of 1992, which recognises the rights of parents to select the forms of instructions their children receive and the types of educational institutions their children attend. Parents are also free to educate their children at home provided they meet basic requirements. According to Nikandrov (1993:47), since the early 1990s the number of private schools, which were not permitted during the years of communist rule, has grown.

In the United States, no state has the power to require a child to attend a government school. A state may require children to be educated or attend school of some kind, but the Constitution preserves the parental prerogative of determining how a child shall be taught. Forty-two states specifically provide for private schooling in their constitutions. Alabama law provides a typical example of the constitutional rights of parents to decide on their children's education: 'A child must attend a public school, private school, church school, or be instructed by a competent private tutor... .' The landmark case for the right to attend private schools in the USA was the *Pierce* decision in 1925. In *Pierce v Society of the Sisters*,<sup>39</sup> the United States Supreme Court invalidated an Oregon statute requiring children between eight and sixteen years of age to attend public schools. The court concluded that by restricting attendance to public institutions, the state interfered with private schools' rights to exist and with parents' rights to govern the upbringing of their children (McCarthy & Cambron-McCabe 1987:70). *Pierce* established the precedent that private school attendance could satisfy a state's compulsory attendance requirements.<sup>40</sup> A similar situation is found in Canada. The constitutional right to establish private schools is found in section 2 of the Canadian Charter, which provides for religious freedom. Moreover, state constitutions provide for the right to establish schools. Private schools are found in all the provinces and no province may compel children to attend public schools.

Closer to home, the establishment of private schools in Namibia is secured by the Republic of Namibia Constitution of 1990 which states that:

All persons shall have the right, at their own expense, to establish and to maintain private schools or colleges or other institutions of tertiary education, provided that:

- (a) Such schools, colleges, institutions of tertiary education are registered with a government department in accordance with any law authorising and regulating such registration.
- (b) The standards maintained by such school, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State.

- (c) No restrictions of whatever motive are imposed with respect to the admission of pupils based on race, colour or creed.
- (d) No restrictions of whatever nature are imposed with respect to the recruitment of staff based on colour or creed.

*(c) Conclusion*

These documents provide ample evidence for the establishment and choice of private schools. In most countries, the right to establish and choose private schools is directly related to the right of religious freedom (see section 3.4.3). Although international documents, domestic constitutions and bills of rights clearly make legal provision for the establishment of private institutions, it is not unconditional. In the various formulations of the provisions, limitations are imposed which generally relate to the standard of education facilities and qualifications of teaching personnel.

3.5.3.3 Scope and application of the bill of rights to private education in South Africa

While the bill of rights provides the legal rationale for the establishment of private schools and creates important rights and freedoms, it also serves to limit the scope of those rights and freedoms. The question of the general application of the contents of bills of rights to private institutions is a somewhat contentious and often cloudy issue. It has already been observed in the preceding discussion on the South African bill of rights, that, traditionally, a bill of rights is primarily intended to protect individuals and groups from any abuse of state authority and power, and is, therefore, only applicable to relationships between the state and its citizens. In other words, it has a vertical application and does not apply to the private law sphere between private persons or bodies. However, it was concluded that the South African bill of rights has horizontal seepage and that under certain circumstances it will be applied to private relations.

In terms of the discussion on private education, the question of who is bound by the bill of rights is an important one because this ultimately affects the internal operations of private institutions. This aspect is dealt with in more detail in chapters 5. In view of what has been stated so far on the vertical and horizontal application of the bill of rights, the question that is examined now is whether the

bill of rights is or should be applicable to private schools and their functionaries, and on what basis one should decide whether an institution, such as a private school, be regarded as a government agency for the purpose of subjecting it to the provisions in chapter three.<sup>41</sup>

It has already been established that the bill of rights does apply to private schools. In deliberating on the horizontal dimension of the bill of rights in the *Baloro* case, Friedman J identified a number of 'non-state' spheres in which the horizontal application is applicable. These include 'private universities, schools, institutions of learning funded by individuals and corporations, which operate in the public domain' (239C). This extends the application of the bill of rights to a large portion of the private sector. However, this is not a clear-cut matter. The question of whether the bill of rights should be made applicable to private schools remains contentious. While there are obvious advantages of extending the application of the bill of rights to the private school sector, it needs to be approached with caution lest that it should extend government action in the private sphere rather than constrain government action which is the primary purpose of the bill of rights. Based on the evidence presented thus far, it can be argued that the bill of rights should only be made applicable to private schools if it is possible to demonstrate that they are linked to government control and are part of the government machinery. It has already been established that the bill of rights binds all executive and legislative 'organs of state' and that this concept includes statutory bodies and functionaries (see section 3.5.2.2). Strictly speaking, private schools per se are not organs of state. However, for the purposes of applying the bill of rights, they are considered to be organs of state.

To establish on what grounds a private body, such as a private school, is an organ of state (in this instance an administrative organ), Wiechers (1985:67) notes that various tests, both formal and material, may be employed. With regard to *formal tests*, first, it is useful to enquire whether the organ has been created by government and secondly, to enquire whether the organ concerned is integrated in some hierarchy of authority in the State. A material test would be to determine the nature of the activity engaged in by the organ and to establish whether the body in question is the bearer of government authority (Wiechers 1985:67-68). If a body satisfies these requirements, it can be considered to be a state organ, in



which case the bill of rights would have application. In the event of litigation involving private schools in which the bill of rights has been invoked, similar tests would be applied. For example, in the *Baloro* case, Friedman J employed a similar test borrowed from US law and practice. According to Friedman J if the following three questions can be answered in the affirmative the horizontal dimension is applicable.

- (a) Whether the activity is a 'public function', that is, operating in the public domain.
- (b) Whether the activity is so linked or 'intertwined' with public action that the private actor becomes equated with the public domain.
- (c) Whether the conduct of the private actor (person) complained of has been approved, authorised or encouraged by the State or public institutions in an adequate manner so as to be responsible for it.

The above tests can be applied to private schools to help establish their status as state organs and determine whether or not the South African bill of rights should be applied to private schools.

*(a) Private schools are created by state legislation*

Bodies established by statute but managed and maintained through private initiative are considered to be organs of state. This clearly applies to private schools. Private schools are not totally free and independent. They are created in terms of legislation, for example the South African Schools Act 84 of 1996, and must comply with regulations determined by the Head of Education. By means of statutory law, the state bestows legal status on private schools and establishes their scope of powers and functions. Therefore, private schools will qualify as organs of state for the purpose of section 7(1). However, this is not necessarily sufficient for the application of the bill of rights.

This position has also been advanced in other countries. For instance, although the Canadian Charter applies to the public sphere, there are cases in which it has been applied to private schools. For example, in *Ontario English Catholic Teachers' Association v Essex Co. Roman Catholic Separate Schools Board*,<sup>42</sup> the court decided that 'a school board is created under a comprehensive statute

dealing with education and has a clearly defined role within the scheme of the statute, and ... in consequence ... the actions of a board may properly be said to be, for the purposes of the Charter, the actions of the "legislature" or "government" of Ontario'.

*(b) Private schools are part of a hierarchical, bureaucratic structure*

A body is recognised as a state organ if it is closely linked with the state administration as a whole. To determine this, it may be asked whether a superior government organ has the power to issue instructions about internal operations and procedures (Wiechers 1985:67). This is evident in the case of private schools. Although private schools function separately and alongside public schools, they still form an integral part of the education system, which is a complex bureaucratic system. They also depend on infrastructure support from the State and function in close cooperation with the structure of state authority. Private schools fall under an education department and are still answerable to the Minister of Education and Member of the Executive Committee (MEC) for Education in each province, who may make regulations affecting internal operations with which private schools must comply. Private schools are thus regulated either directly or indirectly by the State through numerous aspects of policy for all primary and secondary schools. For example, regulations concerning school attendance requirements, teacher certification, curriculum standards and the administration of finance are laid down by an education department which is the superior government organ (see chapter 5).

*(c) Private schools serve a public function*

Education is viewed as a primary function of a state and essentially a public interest with schools acting on behalf of the State to provide education to a community. In this regard, it is argued that private schools serve the interests of the State and public, and therefore fulfil a public function. Therefore, although private schools are founded on the basic principle of independence and autonomy and seek to be free from governmental control, they are still subject to certain state regulations because of the public nature of their role in society and the whole education system. They should therefore be subject to the Constitution as was pointed out in the *Baloro* case *supra*.

This view is supported elsewhere and by other commentators. For example, in the USA, where private schools are not subject to the Constitution (unless there is 'state action'), Judge Skelly Wright argued that private education should be viewed as a public function and therefore governed by the US Constitution:

One may question whether any school or college can ever be so 'private' as to escape the reach of the Fourteenth Amendment .... Institutions of learning are not things of purely private concern.... Clearly the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not agents of the state, subject to the constitutional restraints on governmental action, to the same extent as a private person who governs a company ... or controls a political party (Chemerinsky 1989:277).

On the other hand, it is also argued that private schools existed long before state schools and that education is not something which is not exclusively provided by the state. For example, in the US case of *Rendell-Baker v Kohn*,<sup>43</sup> the Supreme Court refused to find 'state action' in a state subsidised private school. In this case, a teacher claimed that her firing was a result of her speaking out in favour of more rights for students. She argued that she deserved First Amendment protection because the private school was 'an arm of the state'. The Court, however, held that there was no 'state action' and therefore the Constitution provided the teacher with no protection. Unless the teacher could demonstrate that the *state* was substantially involved in her firing, she could not allege state action or apply the Constitution to the private school. The Court observed that the school cannot be said to perform a public function simply because it performs a public service because education is 'not traditionally the exclusive prerogative of the state' (Chemerinsky 1989:279-280).

Chemerinsky's (1989:275) criticism of the state action doctrine and the exclusion of private bodies from the Constitution is conveyed in the following statement:

The term state action refers to conduct by any level of government - local, state, or federal. It includes actions by individual officers. Thus the Constitution prevents a public school, but not private schools, from

discriminating against black and Hispanic students. Why does the Constitution only apply to government? After all, why should society tolerate infringements of basic values - equality, freedom of expression, privacy - just because the violator is private rather than public? Speech can be chilled and lost as much by private sanctions as public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action.

He concludes by saying that:

While it might be desirable to preserve a zone of individual freedom exempt from governmental control, there is no reason why an institution, such as a private school, should have immunity [from the Constitution].

*(d) Private schools and public funding*

It is asserted that private schools receiving financial support from the State should be subject to the bill of rights. This would then apply to most private schools in South Africa because the majority receive substantial state funding (this is explained more fully in chapter 5). However, elsewhere it has also been decided that public funding alone does not render a private institution public to the extent it falls within the public domain of the Constitution. In the USA, for example, the fact that a private institution is substantially state funded is insufficient to constitute 'state action'. This was made clear in a ruling which involved a private school which received nearly all its funding from the State. In *Rendall-Baker v Kohn supra*, Burger CJ observed that 'a private entity performs a function which serves the public does not make its acts state action'. Schools that do not receive any public funding may still be subject to the bill of rights in terms of the previous factors.

It is clear from the above discussion that the South African bill of rights will apply to private schools but not without qualification. This has various implications for the governance and management of private schools, for example, aspects such as admission policies, conditions of service, discipline and religious activities. However, while the governance and management activities must be conducted within the framework of the Constitution, this should not undermine their independence and autonomy. Moreover, no right is an absolute right and the

limitations clause will also apply to situations involving private schools (see section 3.5.1.6). These issues will be discussed in chapter 5 in which the governance of private schools is examined within a legal context.

### **3.6 SUMMARY**

In this chapter the philosophical and legal rationale for private education was examined. Some aspects with which private schools have come to be associated were discussed as a basis for illuminating and understanding the underlying philosophy of the existence and purpose of private education in general. Central to the existence of private schools are the principles of liberty, autonomy, religious freedom, freedom of choice, quality of education and educational diversity. World-wide, the right of parents to direct their children's education has been recognised and provided for in international and domestic legislation. The reasons why parents choose private schools vary but are primarily related to their desire to have their children taught according to their own religious beliefs and philosophical convictions, and the fact that they perceive private schools to provide a better quality of education. Increasingly, parents in South Africa are looking more towards the prospect of private education in the wake of growing discontent with state education.

The second part of this chapter dealt with the legal position of private schools in an international context and within the context of the new South African constitutional dispensation. Private schools in South Africa, as in most other countries, are given constitutional protection. This was illustrated by way of various examples from international law. In keeping with international trends and human rights, the Constitution of the Republic of South Africa Act 200 of 1993 (and now section 29(3) of the new Constitution of 1996; see Appendix C) also guarantees the right of private schools to exist, in spite of some opposition to private education. A particularly important constitutional aspect of this chapter was to examine the relationship between the bill of rights (chapter 3 of the Constitution) and private schools. Opinions on the application of the bill of rights to private persons and bodies, such as private schools, vary. Essentially, the Constitution and the bill of rights govern relations between citizen and state (vertical application) and not between private individuals or bodies (horizontal application). As a constitutional document, the bill of rights sets out minimum

standards to which national and provincial legislatures and actions of state organs and officials must conform. To this end, the Constitutional Court is authorised to review state law and actions to determine to what extent they conflict with the bill of rights which it then has the power to declare unconstitutional and invalid. In terms of the education situation, all education legislation as well as the actions of education officials are subject to judicial review.

Whether or not the bill of rights should have horizontal application remains controversial. Although the international trend is to limit a bill of rights to the vertical application, as evidenced by a cursory examination of case law and legal commentary, South Africa seems to have adopted a more cautious approach. Although there is no direct reference in the South African Constitution Act 200 of 1993 to the application of the bill of rights to private relationships, room has been made for its application to private individuals and bodies, including private schools. However, the extent of the horizontal application is still a matter that needs to be resolved by the Constitutional Court.

The reason for the horizontal application to private schools is based mainly on the public nature of private schools. Examples of this 'publicness' are found in the public function they fulfil in education, state funding and the involvement of state regulation. In chapter 5, the application of the bill of rights to private schools and its implications for the way in which they are governed on a day-to-day basis are examined with reference to several important policy issues, namely private school governance, school funding, the appointment and discipline of teachers, student admission and discipline and religious freedom. However, before coming to this discussion, the next chapter gives a brief explanation of the use and purpose of the postal questionnaire that was used to obtain additional data on these key issues.

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#### ENDNOTES

- <sup>1</sup> Empirical data on the reasons for the growth in private schools is scant but it is accepted that parents' interest in private schools is increasing because public schools are perceived to be failing in their educational goals and are beset with political and

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economic problems hence the loss of faith and security in the public sector to provide a suitable and stable education.

- <sup>2</sup> The statistics on the number and growth of private schools are not comprehensive nor do they necessarily reflect a complete picture. The problem of obtaining accurate statistics is compounded by the large number of fly-by-night private schools that have been established. According to Gauteng education authorities, some 50 private schools have been established in the last few years which need to be investigated. There are also a number of schools waiting to be registered.
- <sup>3</sup> This Act provides for the compulsory registration of all colleges for correspondence education and for establishing the Correspondence College Council who is entrusted with the authority to lay down conditions and standards. A correspondence college is one that is maintained, managed and conducted for the purpose of providing correspondence tuition for reward, but does not receive any grant-in-aid from the State. For the purpose of this study, private correspondence colleges are not included.
- <sup>4</sup> The Independent Schools' Council is an association of private schools, mostly Anglican schools.
- <sup>5</sup> Farm schools are primarily located on privately owned farms and cater mainly for the children of black farm labourers. Previously they were under the jurisdiction of the former Department of Education and Training. Approximately 95% of farm schools are primary schools. In terms of funding, farm owners receive a subsidy of 100% for building costs and 50% for maintenance costs. The State pays teachers' salaries. Farm schools are generally governed by the owner of the farm or an appointed manager.
- <sup>6</sup> This thesis is concerned mainly with primary and secondary private schools. In the last few years a number of 'street academies' and 'cram colleges', some of dubious reputation, have emerged. There are also a number of private colleges which play a very important role in education but which are not dealt with in this thesis.
- <sup>7</sup> In England the terms used to designate the 'private sector' have been confusing. Traditionally 'private schools' were called 'public schools' as opposed to state schools. In recent times the word 'independent' is now used in preference to 'public school'. Today, the word 'private' generally refers to a small number of schools that are essentially owned and managed by an individual person.

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- <sup>8</sup> See for example Fox (1985).
- <sup>9</sup> Adopted and proclaimed by the United Nations General Assembly Resolution 217 A (III) of 10 December 1948.
- <sup>10</sup> For example: United Nations Declaration of Human Rights (1948) articles 2, 18 and 27; article 2 of the First Protocol to the European Convention on Human Rights (1950); International Covenant on Civil and Political Rights (1966) articles 18 and 27; International Covenant on Economic, Social and Cultural Rights (1966) article 15; African Charter on Human and Peoples' Rights (1981) article 8. See also section 3.5.3.2.
- <sup>11</sup> See Smith F & Van Der Merwe 1978. '*n Vergelyking van privaat skoolleerlinge met provinsiale skoolleerlinge*.
- <sup>12</sup> Waldorf Schools are based on the educational principles of Dr Rudolf Steiner (1861-1925) an Austrian scientist and philosopher. The first Waldorf School was opened in 1919 in Stuttgart, Germany. These schools are now found world-wide.
- <sup>13</sup> The 1993 Constitution is referred to as an *interim* Constitution because it is intended to last for five years only. At the time of writing, the Constitutional Assembly was drafting the new constitution, which was intended for 1999, but will now be phased in from 1997.
- <sup>14</sup> Section 4(1) of the Constitution states that 'the Constitution shall be the supreme law of the Republic'.
- <sup>15</sup> Limitation clauses occur in international human rights declarations such as the Universal Declaration of Human Rights (art 29(2)) and the European Convention on Human Rights (art 11(2)), as well as domestic bills of rights such as the Canadian Charter of Rights and Freedoms (s1), the Republic of Namibia Constitution (art 22) and the German Basic Law (art 19).
- <sup>16</sup> The negotiating parties in the Technical Committee debated this at length. The SACP strongly opposed it while the DP were amenable to the horizontal operation.
- <sup>17</sup> The State is divided into legislative, executive and judicial authority. This is according to the constitutional law principle of *trias politica* or separation of powers, which



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requires that in a democratic state a fundamental distinction is made between the legislative, executive and judicial branches of government (Basson & Viljoen 1988:169). This is intended to ensure more democratic and responsible government. Section 7 refers specifically to the legislative authority, which lies in the hand of Parliament, and executive authority, which is responsible for the day-to-day administration of the State. The judiciary has been excluded and is only bound by chapter three of the Constitution to the extent that in adjudicating issues pertinent to human rights it must observe and enforce its provisions.

- <sup>18</sup> Direct application of the provisions of the bill of rights means that the regulation of private relations is automatically subjected to the provisions and can never result in the infringement of any fundamental right protected in such an instrument (Van Aswegen 1995:51). Indirect application implies selective application.
- <sup>19</sup> 1995 (4) SA 197 (B). The facts of the case are as follows. The applicants were all foreign nationals employed as academics at the University of Bophuthatswana. In the second half of 1994, the applicants were required to renew their residence and work permits. Their applications were supported by the first (University) and second (acting Vice-Chancellor) respondents on the grounds that the positions had been widely advertised and that there were no suitably qualified South Africans available for the positions. However, the third respondent, the staff association of the University of Bophuthatswana, demanded that the first respondent withdraw its support of the applications to the Ministry of Home Affairs and that all posts of the 'aliens' be advertised as soon as possible (205D). The third respondent also wrote a letter to the Ministry of Home Affairs requesting it not to renew the work permits of the expatriates because the posts had not been widely advertised and that the applicants did not go 'through an acid test of an interview' as claimed by the first respondent. Moreover, it was alleged that the foreign nationals practised nepotism by appointing their wives in secretarial positions and that their behaviour seriously undermined the Reconstruction and Development Programme (206A-E). In addition to this, in July 1994 the applicants had all applied for promotions which was in response to a circular letter sent to all academic staff inviting applications for promotion. However, in a staffing committee of the first respondent (which makes recommendations on promotions), members of the third respondent objected to the promotions of 'aliens' and called for a moratorium on promotions of foreign nationals. This motion was accepted with the result that the applications for promotion by the applicants were not considered by the staffing committee while those of South African nationals were.

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- <sup>20</sup> Section 8(2) of the Constitution provides, inter alia, that no person can be unfairly discriminated against, directly or indirectly, on grounds of ethnic or social origin.
- <sup>21</sup> 1995 (1) SA 251 (W). In this case, the applicant, then a deputy minister in the Government of National Unity, sought a court interdict restraining the respondent from making defamatory statements and holding a press conference for the purpose of publishing defamatory statements about the applicant who had in 1992 been convicted of assault and kidnapping. The application was dismissed.
- <sup>22</sup> 1995 (3) BCLR 374 (D). In this case, the parents of a student brought an application against the university for refusing admission to the faculty of medicine.
- <sup>23</sup> 1994 (6) BCLR 124 (T). This case concerned an application for damages for defamation resulting from the publication of alleged defamatory material in the *Pretoria News*. The defendants raised the normal defences but later amended their plea by the introduction of an additional defence based on section 15 of the Constitution which guarantees the freedom of speech (which includes the freedom of the press).
- <sup>24</sup> See also *Potgieter v Kilian* 1996 (2) SA 276 (N) and *Holomisa v Argus Newspaper LTD* 1996 (2) SA 588 (W).
- <sup>25</sup> 1996 (3) SA 550 (CC)
- <sup>26</sup> For a critique of the purposive approach to the Constitution and the horizontal application to the private sphere see Visser (1995) *A successful constitutional invasion of private law*. Also see Carpenter and Botha (1996) *The "constitutional attack on private law": are the fears well founded?* which is a reply to the Visser argument.
- <sup>27</sup> 1996 (1) SA 725 (T)
- <sup>28</sup> 1995 (2) SA 672 (E)
- <sup>29</sup> 365 US 715 (1961)
- <sup>30</sup> The Canadian Charter of Rights and Freedoms came into force in 1982.
- <sup>31</sup> (1986) 33 D.L.R 4th

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- <sup>32</sup> The *Dolphin* case concerned an industrial dispute between RWDSU and Purolator Courier Inc. The Union that represented the locked-out employees of the company claimed that Dolphin was acting as a business ally of Purolator and therefore decided to picket Dolphin's premises. Dolphin sought an injunction preventing the picketing from going ahead. The injunction granted was based on the court's finding that the alleged relationship was unproved.
- <sup>33</sup> (1986 ) 57 O.R 2d 1 (H.C)
- <sup>34</sup> Malherbe (1996:7), however, raises the question whether section 32(c) refers to the establishment of private schools (with no right to public funds) or whether it refers to public schools and merely confers on a person a right to public institutions based on a particular language, culture or religion. While Malherbe appears to favour the latter interpretation, rightly or wrongly, this provisions has been interpreted to refer the right to establish private schools (see Appendix C).
- <sup>35</sup> 1 EHRR, Series A, No 23, 7 December 1976. See also endnote 27, chapter 5.
- <sup>36</sup> According to Van Wyk, Dugard, de Villiers and Davis (1994), the right to education is included in the constitutions and bills of rights of at least 59 countries while the constitutions of seventy countries make no mention of it.
- <sup>37</sup> In terms of the application of this law, private schools are divided into *substitute schools* and *supplementary schools*. Substitute schools have a legal right to state financial aid while supplementary schools may receive financial aid but have no legal right to it (Weiss & Mattern 1989).
- <sup>38</sup> Because of strongly divided political opinion over education as a right, it was not included as one of the fundamental freedoms in the 1789 French Declaration of the Rights of Man and of the Citizen. However, the preamble to the 1958 Constitution affirms the fundamental rights set out in the 1789 Declaration and the additional freedoms included in the 1948 Constitution. Moreover, in 1974, France ratified the European Convention on Human Rights which is now incorporated into its domestic legislation. Protocol one of the Convention guarantees education rights and private education (Bell 1992; Dickson 1994).
- <sup>39</sup> 268 US 510, 535 (1925). *In casu* the appellee, the Society of Sisters an organisation who established and maintained private primary and secondary schools and

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orphanages, challenged the Compulsory Education Act of 1922 which compelled children to attend public schools. The appellants, public officers, contended that their purpose was to enforce the statute. However, the strict enforcement of this statute seriously threatened the existence of the Society of Sisters' schools. The court held that the Act of 1922 unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control. In *Pierce*, the court thus protected the property interest of private schools to remain in business and the liberty of parents to control the upbringing of their children.

<sup>40</sup> In more recent times, the *Pierce* decision was confirmed by the US Supreme Court in *Wisconsin v Yoder* 460 US 250 (1972), which is the most significant school case involving a free exercise clause. *In casu* the Supreme Court exempted Amish children from compulsory school attendance upon completion of eighth grade. The court concluded that parental rights to practice their legitimate religious beliefs outweighed the State's interest in mandating two additional years of formal schools for Amish youth. The court declared that 'a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests' (Alexander & Alexander 1985:228-235).

<sup>41</sup> The extent of the horizontal application of the South African bill of rights to private schools has implications for a number of critical managerial issues such as admission policies and religious matters which are discussed in chapter 5.

<sup>42</sup> (1987) 36 D.L.R 4th

<sup>43</sup> 457 US 830 (1982)

## **CHAPTER 4**

### **RESEARCH METHODOLOGY: THE CONSTRUCTION AND ADMINISTRATION OF THE POSTAL QUESTIONNAIRE**

#### **4.1 INTRODUCTION**

The general nature, purpose and legal position of private education in South Africa was the topic of chapter 3. Particular attention was given to the legal position of private education within the constitutional framework. In this regard, the right to establish private schools and the importance of the Constitution of the Republic of South Africa Act 200 of 1993, especially the bill of rights, for private schools were discussed. The discussion in chapter 3 thus focused on the external context in which private schools operate.

In order to investigate the internal operation of private schools within this social and legal context, a survey on selected legal issues relating to the governance and management of private schools was conducted by means of a postal questionnaire. The issues that were dealt with in the survey included private school governance, private school finance, the appointment and discipline of teaching personnel, admission and discipline of students and religious matters. As already pointed out in chapter 1, education takes place within an established legal structure. All the aforementioned areas of school governance and management are regulated and determined by a network of law that consists of constitutional provisions, statutes, regulations, policies, common law and judicial precedent. In addition to these sources of law, which form the basis of the legal discussion in chapter 5, the questionnaire was used to gather factual data on the various issues that was not available in the literature but which is essential to the discussion. Therefore, before discussing how the law shapes and influences the internal operation of private schools, it is first necessary to explain and describe the construction and administration of the questionnaire.

#### **4.2 DESIGN AND USE OF THE QUESTIONNAIRE**

Because of the dual nature of this study (ie, it deals with both education management and education law), the principles of descriptive research and legal

research have been employed (see chapter 1). The postal questionnaire was one of the methods used to gather data (see section 1.6). The main purpose for using the questionnaire was to gather information on specific issues that is not readily available and which is required to supplement the literature survey and analysis of legal documents. This was necessary in order to conduct a more thorough and meaningful discussion on the research problem.

Although the questionnaire is often criticised and viewed as a limited research instrument that should be used with caution (Mouly 1978:188-189), it is still one of the most used instruments for collecting data (Best 1970:116-119) and frequently the best form of survey in carrying out an education inquiry (Cohen & Manion 1980:109). For the purpose of this study, the questionnaire was deemed a suitable method for obtaining data on specific issues relating to the research problem. The questionnaire enabled the researcher to research a large number of private schools covering a wide geographical area that, otherwise, would not have been reached. Moreover, the information that it seeks to obtain is not readily available in other sources largely owing to the paucity in literature and research on legal aspects of private education. In addition to this, the primary purpose of using the questionnaire was to try and discern general trends and patterns in terms of the legal status and governance of private schools and to raise matters on issues that warrant investigating prior to laws being adopted on private schools. The questions therefore served as a springboard for discussion. Finally, a major consideration in selecting the questionnaire was the financial viability. Questionnaire surveys are considered to be a cost effective method for gathering data from a widespread population.

#### **4.2.1 Research subjects**

The questionnaire was aimed specifically at primary and secondary English medium *private schools*. It was sent to the principal of each school who was requested to complete the questionnaire. Because of the small number of private schools, it was decided to target the whole population. The question of what constitutes a private school was taken into account when drawing up the list of private schools. However, as pointed out in section 3.3, defining a private school is not straightforward. As yet there is no single definition of a private school that is wholly adequate. Therefore, for the purpose of determining the target group,

the definition given in the Private Schools Education Act 104 of 1986 was used. Special schools, farm schools and state-aided (Model C schools) were thus excluded as these do not constitute private schools per definition. Once the target population had been identified, problems were encountered in obtaining reliable statistics on the number of private schools in South Africa and an up-to-date list of all registered private schools.<sup>1</sup> This was largely due to the fact that the nine newly constituted provincial education departments were in the process of being restructured and education officials were unable to provide comprehensive and up-to-date information. There was also a moratorium on the registration of private schools so it is not known exactly how many non-registered private schools are currently operating. The end result was that questionnaires were sent to 400 private schools. The list was made up from various lists offering the most recent information.

#### **4.2.2 Identification of key management issues**

Education management is a vast and complex field and the management of a school covers a wide range of activities and processes. Therefore, it is neither possible nor prudent to cover every aspect of governance and the management of a private school in one study. Therefore, it was necessary to identify and delineate certain key issues or categories for investigation. The specific issues identified for investigation were: private school governance, private school finance, appointment and discipline of teaching personnel, admission and discipline of students and religious matters. These aspects constitute some of the most important areas of private school governance and management and have given rise to critical legal questions in terms of the Constitution of the Republic of South Africa Act 200 of 1993 and new provincial education legislation. The questionnaire was therefore constructed to explore these specific areas.

#### **4.2.3 The construction of the questionnaire**

Due consideration was given to the construction of the questionnaire in order to encourage an acceptable response rate. Prior to the construction of the questionnaire, a thorough literature study of the research topic was conducted as highlighted in chapter 1. A number of key issues were identified for which

information was required (see section 4.2.2) and a list of questions were formulated that addressed these specific issues. The draft questions were submitted to a number of experts in the field of education and educational research for evaluation. Based on their comments and suggestions the questions were revised several times. Each question was then evaluated in terms of its value and purpose. In this way, superfluous and less essential questions were omitted and the number of questions reduced. Therefore, each question selected for the final draft made a definite contribution to the overall study, which was now focused and clearly defined.

Open and closed questions were used. In order to vary the format of the questionnaire, three types of closed questions were used: *yes/no* questions, questions with several options from which to choose and a five-point scale (*strongly agree, agree, neutral, disagree, strongly disagree*). The questions were grouped in a way to provide a sense of order, continuity and ease. They were arranged according to the type of question. Thus section one consisted mainly of the questions with several options, section two included simple questions which required a *yes* or *no* response and section three was a short section based on the five point scale. For several of the questions the option 'Other - please specify' was included. However, although many respondents chose this option they did not always provide the 'other' information. This did not detract from the overall response, however. In addition to the closed questions a number of open questions were interspersed throughout the questionnaire. These were designed to provide the respondents with an opportunity to comment more fully and in their own words on a particular question. Most of the open-ended questions were indicated as optional so as not to discourage respondents from completing the questionnaire. The responses that were given to the open-ended questions were in many instances insightful and have been recorded verbatim where necessary in the discussion in chapter 5.

When constructing the questionnaire, specific attention was given to the content of the questions, vocabulary, ambiguity and the knowledge that was expected of respondents. With regard to the content of questions, it is important for all the questions to be relevant to the subject. Every effort was made to include questions that made a direct contribution and would elicit valid and reliable



answers. Each question related to one of the key issues that had been identified for investigation and there were several questions dealing with each aspect to provide adequate coverage of the overall topic (see section 4.2.2). Questions that were viewed as impertinent and sensitive, for example, questions about racial composition of the school (even though this could be very useful) and/or questions likely to be confidential, for example the exact amount of school fees, were omitted. Sensitive legal questions that are likely to promote falsification were also omitted. (For example, *Do you use corporal punishment in spite of recent legislation prohibiting its use?*) Clarity of words is also indicative of a well-constructed questionnaire. This is the most difficult aspect because what seems very clear and obvious to the researcher, can be vague and confusing to the recipient. Every attempt was thus made to use modern, simple vocabulary and to avoid difficult vocabulary and legal jargon. Likewise, the questions were constructed to avoid ambiguity and to eliminate the presence of more than one idea in a question. Furthermore, questions that required specific legal knowledge were used judiciously since not all school principals could be expected to necessarily have a knowledge of education law. To this end the pilot study was very useful and important, as it helped refine the final questionnaire. Finally, careful attention was given to the length and layout of the questionnaire. An effort was made to keep the questionnaire as short as possible and to use a simple, clean layout design that would hopefully expedite the completion of the questionnaire and increase the return rate. (The questionnaire has been reproduced in Appendix B.)

#### **4.2.4 The pilot study**

The final draft questionnaire was piloted with three representatives of the target group. Two of the respondents were school principals and the third was a school governor and legal expert. The respondents were asked to complete the entire questionnaire and comment on the content and suitability of questions, format and length of the questionnaire and the use of vocabulary especially with regard to the legal concepts. Several revisions were made to the questionnaire following the pilot study.

#### **4.2.5 Final administration and execution of the questionnaire**

The questionnaire was administered and processed between March 1996 and June 1996. Questionnaires were sent to 400 private schools. A brief and courteous covering letter, explaining the purpose and importance of the research, and a stamped, addressed return envelope accompanied each questionnaire. A follow-up letter was sent to each school. Because it was decided to ensure complete anonymity, it was not possible to send follow-up letters to selective schools. The letter was therefore formulated both as a courteous thank-you letter to the respondents and a polite reminder to non-respondents to return their questionnaire.

#### **4.2.6 Response rate**

One of the difficulties with postal questionnaires is that the percentage of return is usually small.<sup>2</sup> For this study a response rate of 34% was obtained (that is, 136 out of 400 questionnaires were returned and processed). It was considered opinion that the questionnaire was very relevant and had sufficient appeal that a high return rate could have been expected. Nevertheless, the low response rate can be attributed to a number of factors, including an unreliable postal service. One particular problem encountered was that some private schools had closed down (which was not reflected on official lists) and many had or were in the process of changing from private to state-aided schools. Fifteen questionnaires were returned that were not filled in as the schools were in the process of converting to state-aided schools.<sup>3</sup> In addition to this, one private school organisation, representing a particular group of private schools, informed the researcher that they were not in a position to assist with the investigation. However, although the response rate was low, it was regarded as sufficient for the descriptive nature and purpose of this inquiry. The responses received yielded sufficient factual data to draw reasonable associations, trends and comparisons. While every attempt is made to provide adequate and up-to-date evidence, it is acknowledged that the issues dealt with are complex and that more empirical data is necessary before definite conclusions can be drawn. The survey thus provides a useful basis for further research.

### **4.3 ANALYSIS OF DATA**

Descriptive statistics were used to record the results obtained from the questionnaires. A frequency table was compiled for each of the 50 questions and then analysed. The frequency table indicates the total number of responses, the frequency of each response and the percentage of the total number of responses. The tables enabled the researcher to make useful observations about particular trends in private education with regard to the critical issues that were identified for investigation. All the tables that are referred to in chapter 5 are recorded in Appendix A.

### **4.4 SUMMARY**

Research on private schooling in South Africa is very limited with the major studies focusing on historical developments or sociological issues. Few studies have dealt specifically with the governance and management of private schools, especially from the legal perspective (see chapter 1). Therefore, because of the paucity of literature on private schools in South Africa, a postal questionnaire was used to conduct a survey on legal issues relating to governance and the internal management of private schools. Notwithstanding the problems associated with the use of questionnaires, for the nature and purpose of this study, the questionnaire was considered appropriate for a number of reasons. It deals with a significant issue (namely, the influence of the law on private school governance and management) and seeks to obtain factual information that is not available elsewhere. Adequate steps were taken to ensure a scholarly questionnaire that was easy to read and complete. The information gathered is essential for supplementing existing literature and for providing a springboard for discussing and analysing important legal issues within a complex legal setting.

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### **ENDNOTES**

- <sup>1</sup> See chapter 3, tables 3.1 and 3.2. Current figures for the number of private schools are given as between 474 and 569 (this includes some special education schools which were excluded from this study).

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- <sup>2</sup> Travers (1969:199) suggests that a questionnaire of some interest to the recipient may be expected to show only a 20% return, even when conditions are favourable. If non-respondents are contacted a second and third time the return may increase to 30%. Only rarely does it reach 40%. Cohen and Manion (1980) note that a well-planned survey should obtain at least a 40% response.
- <sup>3</sup> Several questionnaires were received long after the return date, by which time the results had already been processed.

## CHAPTER 5

### THE LEGAL STATUS OF PRIVATE SCHOOLS AND THE INFLUENCE OF THE LAW ON THEIR INTERNAL OPERATIONS

#### 5.1 INTRODUCTION

In the study so far, the discussion has focused on the historical development of private education from a legal perspective (chapter 2), the philosophical and legal rationale for the existence of private schools (chapter 3) and the legal position of private education within the current constitutional framework (chapter 3). Having examined the external context of private education in general, the discussion now turns to the influence of the law on the internal management of private schools. The main purpose of this chapter is to examine more closely some of the issues unveiled in chapters 2 and 3. This chapter is organised around the following key legal-managerial issues (see section 4.2.2): the legal status and governance of private schools, private school finance, the appointment and discipline of teaching staff, the admission and discipline of students and religious issues. These key issues are discussed in the light of the discussion so far and the survey data obtained by means of a postal questionnaire (chapter 4). Each of the key issues is discussed in terms of the law, the governance structures and processes which relate to it and the influence on management practice.

Education does not take place in a vacuum. It is influenced by various contextual factors such as political, economic and social phenomena. Education is also influenced by the legal system in which it operates. This has already been demonstrated in the discussion in chapters 2 and 3. Education management thus also exists and operates within a *legal setting*. This means that all the managerial activities and functions which take place in a school should be carried out within the framework of the law. A dual relationship exists between school management and the law. On the one hand, the law provides rules, regulations and principles that determine, shape and guide all aspects of the internal operations of a school. For example, it provides the legal framework for the development of school policy and rule-making and provides regulations on a wide range of legal matters relating to staff, students, the curriculum et cetera. On the other hand,

management situations that arise in the course of day-to-day school activities sometimes give rise to perplexing legal questions which the law is required to address and in so doing shapes and influences the development of education law. There is thus a constant interaction between the law and school management. Watson (1982:25) also notes that the ways in which education and education-related policies are formulated and determined, and the legal framework in which educational institutions operate are significant for their functioning and the analysis of management situations.

## **5.2 OWNERSHIP, GOVERNANCE AND CONTROL OF PRIVATE SCHOOLS**

As stated earlier in this thesis (see chapter 1), little detailed research has been conducted on private school governance which is, in fact, complex and very diverse. The survey on legal issues relating to private schools reveals that private schools display different types of ownership and governance structures.

### **5.2.1 Ownership and the legal status of private schools**

The legal right to own and establish a private school was discussed earlier in chapter 3. Ownership is one of the important factors that distinguishes a private school from a state school, which is considered to be a state organ. By definition, private schools are owned by a non-government agency. However, the question of who owns a private school is complex.

In the survey, respondents were requested to indicate the proprietor of the school (ie, the person who owns and maintains the school) (table A1) and the nature of the school's legal status (table A2). According to table A1, a majority of the respondents (40%), indicated that their school is owned by a religious body, order or group (see table 3.3 for the distribution of church-affiliated schools). In many instances the school buildings are owned by a religious group and rented by a separate individual or group who operates the school as a private enterprise. Likewise, some private schools are managed by trustees who look after the interests of the trust (which in practice means they control the assets of the school) while the actual conduct of school activities is managed by a different group.

The legal status of private schools also varies. According to table A2, 58.3% of the schools that responded are organised as non-profit organisations. A few schools are owned as close corporations (3.9%) and one school was listed as a private company. Unfortunately, most of the respondents that chose 'other' as their option did not provide the additional information requested. Several of the respondents were unsure of the legal status of their school and omitted a response.

#### 5.2.1.1 Education Trust

Twenty-eight respondents recorded their schools as being registered as an education trust. During the early stages of the development of education in South Africa, it was not uncommon for schools to be established and administered as trusts. The words 'trust' and 'trustee' and the trust idea were introduced into the Cape after the British occupation in 1815 and later spread to Natal and the rest of the country. The notion of trust therefore originated from English law and became part of South African law through custom. However, English trust law did not become established in South African law. South African trust law has developed in practice and by the courts within the framework of Roman-Dutch law (Cronjé 1995:131) and has thus since developed into its own unique form of law (Honoré 1985:132). It was therefore not surprising to find that most of the schools that were recorded as being education trusts were schools that had been established during the 1800s and early 1900s.

In essence, a trust arises when one person or a group, called the trustee, is charged with the legal duty of holding property for the benefit of some other person or persons, known as beneficiaries, or for some other purpose which is permitted by law. Therefore a variety of trusts may be created for many different purposes. Trusts may be established for the benefit of beneficiaries or for an impersonal nature (*ad pias causas*), such as trusts for religious, educational and charitable purposes. Trusts for purposes beneficial to the community will be enforceable if they are considered to be charitable. Therefore, an institution, such as a school, may be established as a charitable trust if, according to Honoré (1985:132) it is 'inspired by a charitable nature and if its main object is beneficial to the public or a substantial section of it'. If the purpose of the trust is to make a profit, it will not qualify as charitable. The private schools in South Africa that

have been created as trusts are mostly church schools with the trust being vested in the diocesan authorities who are responsible for administering the trust in accordance with the trust instrument and the special duties imposed on them by law.<sup>1</sup> The main advantage of establishing educational institutions as charitable trusts is that they enjoy certain income tax benefits in terms of section 510(1)(f) of the Income Tax Act 58 of 1962. A charity can be exempt from paying tax on income that is applied solely for charitable purposes.

#### 5.2.1.2 Incorporated association not for gain

A special type of company not for profit and which may only be incorporated as a company limited by guarantee (to distinguish it from the ordinary public company) is the so-called section 21 company or association not for gain. In terms of section 21 of the Companies Act 61 of 1973, private schools may also be established as a company limited by guarantee. The majority of the respondents listed their schools as associations not for gain which means that it may not apply its profits or assets amongst its members. This, however, does not preclude it from making profits provided they are used to further the main object of the organisation.

The requirements for establishing an association not for gain are as follows (section 21 of Act 61):

1. The association is formed for a lawful purpose.
2. Its main object is to promote religion, arts, science, recreation or any other cultural or social activity.
3. It applies its profits (if any) or other sources of income to promoting the main object.
4. It prohibits the payment of any dividends to its members.
5. It provides the following in its memoranda:
  - (i) the income of the property of the association shall be applied solely towards the promotion of its main object and no portion of it shall be paid directly or indirectly, by way of dividend, bonus, or otherwise, to the members of the association or to its controlling or controlled company, and



- (ii) that upon its winding-up, deregistration or dissolution, the assets of the association remaining after all liabilities have been settled shall be given or transferred to some other association or institution having objects similar to its main object, to be determined by the members of the association at or by the time of its dissolution, or failing that, by the court.

Many school governing bodies register a private school as an association not for gain for operating the school since this ensures that school finances and other income can be exempted from income tax. However, associations not for gain no longer enjoy automatic tax exemption. This means that they now have to make the necessary application (Beuthin & Luiz 1992:32).

#### 5.2.1.3 Close corporation

In law, some private schools have the legal status of a close corporation. Five schools in the survey were listed as a close corporation. This is a more recent development in the private school sector and highlights the trend towards the application of the principles of privatisation in the education sphere. Unlike educational trusts and associations not for gain, a close corporation is run as a profit making business. The close corporation is a relatively new form of small business which was made possible by the appearance of the Close Corporation Act 69 of 1984. The Act introduced a convenient legal framework for conferring juristic personality on small businesses (Honore 1985). Hence it is only in recent years that private schools are being established and administered as close corporations. The main purpose of this Act was to provide legislation to enable small businesses to be established and conducted outside the ambit of the Companies Act 61 of 1973 which is considered too complicated and extensive for the small company. Therefore, small business enterprises that are created in terms of the Close Corporation Act can dispense with many of the statutory formalities and requirements generally required under the Companies Act (Beuthin & Luiz 1992:32). A close corporation can be established by one or more persons but not exceeding ten (section 28). A close corporation is registered with the registrar of close corporations according to procedures set out in the Close Corporation Act 69 of 1984.

Private schools registered as close corporations are therefore subject to the regulations set out in the Close Corporation Act. They are also subject to certain sections of the Companies Act and are taxed in the same manner as a company. However, since their principal business is education, they are eligible for certain tax benefits. For example, section 18A(2)(b) of the Income Tax Act 58 of 1962 makes provision for income tax deductions for donations made to secondary schools. This concession applies only to donations made to acknowledged educational funds and is not applicable to the payment of compulsory school fees.

#### 5.2.1.4 Private company

Private schools operated as private companies are a further example of the diversity in the type of legal status and ownership and the evidence of privatisation. Only one of the schools that responded was listed as a private company. However, the number of private schools being created as private companies is increasing. The Companies Act 61 of 1973 is the 'enabling legislation' that enables a company to be formed for 'any lawful purpose'. Private schools created as private companies are operated as profit-making businesses and are subject to the Companies Act 61 of 1973. Unlike a close corporation, a private company is governed by more complex rules and regulations.<sup>2</sup>

#### 5.2.1.5 Summary

The preceding discussion illustrates the diversity in the private school sector with regard to the legal status of private schools and the alternative ways in which private schools can operate. In terms of their legal status, private schools may be organised as education trusts, associations for non profit (section 21 companies), private companies or close corporations. Most private schools in South Africa fall within the first two categories.

The type of legal status gives rise to different legal rights and duties. The trust is one of the most flexible means of administering schools from the legal point of view. A trust is not a juristic person and is subject to the regulations under the Trust Property Control Act 57 of 1988 which are less stringent than those imposed by the Companies Act 61 of 1973 and the Close Corporation Act 69 of

1984. Like a shareholder of a company or a member of a close corporation, a trustee obtains limited liability but is not subject to the duty imposed on companies of maintaining their capital for the protection of creditors (section 38) or the requirements for the acquisition of a member's interest in a close corporation (sections 28-30). A trust need not make any annual financial statement and its accounts need not be audited unless it is required to do so in a particular case. There are no statutory restrictions on the qualifications of trustees (section 128), the method by which trustees take decisions (section 197) or the name under which the trust carries on its business as in the case of companies and close corporations. There is also no limit on the number of trustees appointed whereas a close corporation is limited to ten persons who must be natural persons (Honoré 1985:74-75).

A primary advantage of private schools being established as trusts and associations not for gain is the taxation benefits they receive. In addition to basic company law that regulates the operation of private schools, all private schools are subject to national and provincial education legislation.

### **5.2.2 Registration of private schools**

Although individuals or groups have a constitutional right to establish a private school, all private schools are required to be registered with an education department in terms of section 45 of the South African Schools Act 84 of 1996. The requirements for registering a private school are determined by the Head of Education (HED).<sup>3</sup> According to section 46, a Head of Education must register a private school if he or she is satisfied that (a) the standards in such schools will not be inferior to the standards required in public schools, (b) the admission policy does not discriminate on the ground of race and (c) the school complies with the grounds for registration set by the Member of the Executive Council which are to be published in the *Provincial Gazette*. Mandatory registration is designed to ensure that private schools reach a minimum standard of quality education and equality.

In addition to this, every private school is required to have a constitution which must be submitted to the HED for *approval*. Constitutions are essentially a school's 'articles of government'. The body responsible for drafting a school's

constitution is shown in table A4. Although the constitution may vary from one private school to another, in general they provide information concerning the registered name of the school, the main objects of the school, the methods of appointment, composition, functioning, powers and duties of school governors, primary functions of the principal and general regulations concerning the amendment of the constitution. Depending on the legal status of a private school, the school's constitution will be in keeping with the memoranda and articles of association (as in the case of companies) and the Trust Deed in the case of trusts.<sup>4</sup> Even if the Trust Deed was registered a hundred years ago, it remains in force.

In view of the legal status and autonomy of private schools, as well as the constitutional right of private schools to be established, it is a moot point whether or not it should be mandatory for a private school to submit its constitution to the HED for approval or whether this is simply one example of unnecessary state involvement. Difference in opinion on this matter is illustrated in the response to a question on whether private schools should be compelled to submit their constitution to the HED for approval in which 45.1% of the respondents said *yes* and 54.9% of the respondents said *no*. While the requirement of a constitution per se is not questioned, of particular concern, however, is the information that is required by the HED and the fact that this must be approved by the HED. For instance, according to the Gauteng Education draft discussion document on regulations for private schools (1996), 'a constitution for the school shall be approved by the Head of Education. This constitution shall specify the character, aims, governance, funding, admissions policy and other relevant matters relating to the control of the school'. By the fact that a school's constitution must be *approved* by the HED it is assumed that the HED may refuse registration if he or she is not satisfied with the content of the constitution. This clause implies that the HED could have an extensive say over the internal affairs of a private school. This raises the question of what information can *reasonably* be expected to be included in a constitution. In other words, what information is necessary and justifiable for registration purposes and for notifying the HED of the school's business, and what information is clearly of a 'private' matter.

### 5.2.3 The structure and governance of private schools

Before discussing the organisational structure and governance of private schools, it is necessary to clarify certain concepts. Often the terms 'governance', 'management', 'administration' and 'control' are used interchangeably in literature. These terms are not synonymous and in this study a distinction is made between the concepts *governance* and *management*.

In essence, governance is concerned with strategic issues while management is concerned with the day-to-day operation of a school. For example, Watson (1982:21) refers to governance as 'the processes and structures whereby policy of relevance to educational organisation are formulated and determined'. Although there are many definitions of management it is generally viewed as the planning, organisation and control of the activities of a school in relation to its goals. The South African education white paper (2) on the Organisation, Governance and Funding of Schools also makes a clear distinction between the two concepts. According to the white paper (South Africa. DNE 1996:16), governance means policy determination and management refers to 'the day-to-day organisation of teaching and learning, and the activities which support teaching and learning, for which teachers and the school principal are responsible'. In some schools the separation between these two spheres and the functions of each group are distinct and fairly rigid while in others there is greater overlap and integration.

Private schools exhibit a variety of governance structures. Each school generally has its own organisational structure and style of management to suit its needs and circumstances. Some schools, in particular religious-affiliated schools, have a governance hierarchy comprising several levels of authority, whereas other types of private schools have fewer levels of governance and are unattached to a higher authority beyond the school governing body.

Catholic schools, for example, are very complex and varied when it comes to the organisation structure of schools. Many have a strong governance hierarchy. They are operated by a wide variety of religious orders, who are ultimately responsible to the head of the order, or they may function under the diocese and be subject to the authority of the Church hierarchy. Prior to the Second Vatican

Council, the governance of Catholic schools was conducted through the traditional church hierarchy of bishop, parish or religious order, school governing body and principal in a descending order of authority. Nowadays, with the increasing involvement of laity, governance has devolved to local level and become more decentralised (personal interview with school governor of Catholic school). This means that local school governing bodies have acquired wider powers and functions, and there has been a noticeable increase in parent participation. Catholic schools, therefore, are not a particularly homogeneous group except insofar as they subscribe to the tenets of the Roman Catholic faith. Similarly, Anglican schools, which comprised the second largest group of schools in the survey, have an established hierarchy that incorporates church authority.

#### **5.2.4 Organs of governance and their legal status**

For the purpose of this study, the discussion on organs of governance is confined to the legal status and position of the school governing body and the principal who have special powers, capacities and duties, which enable them to fulfil their managerial responsibilities.

##### **5.2.4.1 Governing body**

All schools have a particular body which is charged with the internal governance of a school. This body may or may not be the proprietor of the school. The organs of governance again illustrate the diversity amongst private schools and reflect the different kinds of legal status (table A4).<sup>5</sup> Of the schools surveyed, 67.6% are governed by a body generally referred to as a Board of Governors. Some of the private schools surveyed did not have a governing body. For example, four of the schools that are operated as close corporations do not have a governing body. The members of the close corporation govern the school. The powers, functions, duties and liabilities of the members of the close corporation are prescribed by statute and are set out in the corporation's memorandum. Likewise, in schools administered as private companies, the powers, duties, functions and liabilities of the board of directors are governed by statute and are set out in the company's articles. Although the nature of governing bodies may vary from one school to another, in general, the basic legal aspects of their organisation, composition, powers and duties are similar. For the purpose of this

study, the term 'governing body' is used generically and refers to the governing body of a school whether the body is designated as a board of governors, board of trustees, board of directors (eg, in the case of a private company or close corporation), or some other similar title.

*(a) Appointment and composition of governing bodies*

Governing bodies usually consist of a chairperson and vice-chairperson, treasurer, secretary and the school principal who is an *ex officio* member. In the case of religious schools, a representative of the religious group serves on the governing body. The school governors are generally appointed by the proprietor, which for most schools is a religious body, in consultation with the principal. The office bearers are elected by the members of the governing body. Unlike governing bodies of state schools which are nominated and elected by the parents, in private schools parents do not necessarily participate in the election of school governors. However, as a matter of sound governance parents may be nominated to serve on the governing body and school governors remain accountable to parents through the annual parents' meeting, annual reports and parent-teacher associations. To date, statutory regulations, determined by state officials, on the nature and composition of governing bodies in private schools have been limited.<sup>6</sup>

*(b) Legal powers and duties of the governing body*

The legal powers and duties of school governors are derived from statutes and common law. In the case of private schools, their powers and duties are found in the specific legal instruments according to which the school is established (see section 5.2.1) as well as various education legislation and regulations which pertain to public and private schools.

*(c) Primary functions of school governing bodies*

The role and functions of governing bodies may vary but they are mostly concerned with the following:

- draft and adopt the school's constitution

- develop the strategic framework of the school which includes determining the education character and mission of the school
- appoint staff
- determine contract requirements
- determine the student admission policy
- adopt a code of conduct for students
- administer the financial affairs of the school
- determine the budget
- administer and control the movable and immovable property of the school
- maintain the premises
- oversee the general conduct of the school, that is, the overall running and internal organisation of the school

Governing bodies confine most of their activity to governance tasks and do not generally involve themselves with professional matters, such as the allocation of staff duties, time-tabling and day-to-day school discipline (except, for example, when decisions involving expulsions are made), although ultimately the principal is responsible to the governing body on these matters.

#### *(d) Legal liability*

The issue of legal liability in the context of private schools is complex and it is therefore difficult to generalise about liability. Governing bodies of private schools have greater decisional autonomy and discretionary power than public school governing bodies. However, this does not relieve private school governors from their general duty to act prudently and diligently when fulfilling their position of trust. Moreover, although there is little law concerning the fiduciary duties of private school governing bodies, the general law governing managers of corporations and unincorporated associations is pertinent to non-profit and for-profit schools (see table 5.1). While it is not possible to discuss this law in detail, a few broad legal principles are highlighted.

First, in order to be able to answer the question of who is liable for various acts in private schools, it is necessary to understand the concept 'juristic person'. A juristic person is an artificial or abstract fictitious legal body. This means that the juristic person itself can acquire rights, which can be enforced against others in a



court of law, and incur legal, duties which can be enforced against itself without having a visible body. It thus stands apart from the people who are its members and can sue and be sued in its own right. However, a juristic person cannot participate in legal activities or function in the same way as a natural person and therefore operates through its functionaries. Examples are companies, universities, churches and schools (Beuthin & Luiz 1992:6-9; Kleyn & Viljoen 1996:115).<sup>7</sup>

Similarly, a private school is a juristic person that operates through its functionaries, namely the governing body and principal.<sup>8</sup> This means that the school can sue and be sued as a separate legal entity from the governing body. The governing body stands in a fiduciary relationship (a relationship of trust) to the school (the juristic person). In other words, the functionaries have a common law duty to act in *good faith* and to perform their duties with *care and skill*. The requirement that functionaries must act in good faith means inter alia that they must exercise their power for the purpose for which it was given and for the benefit of the school, and they must act within the limits of their powers. Moreover, a functionary is expected to exercise the care and skill which can reasonably be expected of a person with his or her particular knowledge and experience. The extent of the duty and care of a functionary depends mainly on the nature of the obligations that he or she assumes.

When a functionary fails in his or her duty or commits an unlawful act that is detrimental to any member of the school community, the school may be held legally accountable or *liable* for such actions. Invariably, in the case of an action for liability, it is the school that is sued.<sup>9</sup> In any action against a juristic person, a servant (eg, director) of the institution is cited as the representative who then acts on behalf of the juristic person. However, it is the school that is fined and not the representative. This does not preclude individual school governors from being personally sued. In some cases, the school and school governors can be jointly and severally sued.<sup>10</sup>

In the private school context, the nature and extent of liability of schools and the functionaries is found in statutes and common law. Once again, where liability is concerned, it is necessary to examine each school and its particular legal

instrument as well as its constitution (articles of government) to determine the nature of liability (see table 5.1 which gives a summary of the type of private school and relevant sections of the legal instrument which can be consulted for this purpose). In terms of liability, the law distinguishes between criminal and civil liability. Criminal liability arises when a person (natural or juristic) engages in conduct that contravenes standards expressed by criminal law. For example, misappropriation of school funds. Civil liability arises when a person engages in conduct that results in harm to a private individual. For example, a teacher is wrongfully dismissed (breach of contract) or a student sustains an injury playing on defective playground equipment (negligence). In some cases, the same offence can give rise to criminal and civil liability. For example, if a principal metes out excessive corporal punishment the *school* can be charged with assault, which is a criminal offence, and can also be sued in a civil court for damages resulting from the assault.

**Table 5.1 Statutory provisions dealing with legal liability**

LEGAL STATUS	FUNCTIONARIES	LEGAL INSTRUMENT
Trust	Board of Trustees	Trust Property Control Act section 9
Section 21	Board of Governors	Companies Act 61 of 73 Criminal Procedure Act 51 of 1977 section 332(7)
Close corporation	Members	Close Corporation Act 69 of 1984 section 43(1)
Private company	Board of Directors	Companies Act 61 of 73 Criminal Procedure Act 51 of 1977 section 332(1) and 332(5)

#### 5.2.4.2 School principal

The principal of a private school is usually appointed by the governing body. He or she is the professional leader of the school and is the central person who serves as the main link between the school community and governing body. The powers, functions and responsibilities of the principal are prescribed by the

governing body as well as by education legislation, common law and case law. The principal is vested with wide discretionary powers, which enable him or her to execute school policy, agreed to by the governing body, and ensure effective day-to-day management. The principal is thus the 'chief executive' of the school who is responsible for carrying out functions within the framework of the policies determined by the governing body through the school's management structures. As a rule, the principal, deputy principal(s) and the department heads form the executive management committee which is responsible for overseeing daily managerial and educational activities.

The relationship between the principal and governing body is crucial for effective school management. In some private schools, the principal is given extensive control over the running of the school while in others, the governing body plays a more prominent role and maintains tight control over the management of the school. As the acknowledged educational expert, the principal should be given ultimate control over the internal working of the school. If every decision had to be referred back to the governing body, chaos would reign. For this reason it is essential for the principal and governing body to share powers, functions and duties.<sup>11</sup>

#### **5.2.5 Powers, functions and duties: the applicability of administrative law principles**

The powers and functions of school governors and principals are exercised within a legal framework which is a composite of legal rules, regulations and principles derived from the various sources of law. In terms of the legal status of private schools it is evident that the internal governance and functioning of private schools operates within the field of private law. The issue that is now considered is whether the internal functions and relationships are also subject to the rules of administrative law which is that part of public law that governs the organisation, powers, and actions of state administration (Wiechers 1985:2). Administrative law therefore operates within the field of state administration and is concerned with the regulation of state institutions, their relationship with one another and with individuals. Thus, for example, state schools are subject to administrative law since they form part of state administration.

Because private schools are private bodies and not government bodies *per se*, some argue that the rules of administrative law do not apply to private schools. This argument was demonstrated in the case of *Embling v St. Andrew's College (Grahamstown), and Another*<sup>12</sup> in which the rules of natural justice were brought into question. The appellant based his argument on the basis that the school (which is a private school) had performed a function as a public body and should be subject to administrative law. However, this was rejected by Cooper J who stated that:

[The] second respondent [school council] is a private body. It is thus inappropriate and misleading to describe [the] second respondent as an administrative body. Through this abuse of terminology counsel endeavoured to make the second respondent a public body subject to the *audi alteram partem* rule, a rule which is not applicable to an ordinary master and servant contract.

The argument that a private school is not subject to administrative law because it is a private body is, however, open to criticism. The laws pertaining to the governance and internal management of private schools need to be considered in terms of the purpose and context in which they operate. In chapter 3, the 'public status' of private schools was discussed at length in terms of the bill of rights. To summarise, it was argued that private schools are one of the 'non-state' entities that are regarded as 'state organs' for the purpose of applying the bill of rights because of the public function they fulfil and the fact that they are part of the education hierarchy. They are also, to a large extent, dependent on financial support from the State. The same test can be applied in order to determine if private schools are subject to administrative law. Bearing in mind that administrative law only governs relationships in which at least one of the subjects is a government organ, it is necessary to determine what constitutes a government organ for the purposes of applying administrative law principles. In terms of the discussion in chapter 3 it can be stated that administrative law principles can be applied to the internal operations of private schools for the following reasons: they cannot exist without the permission of a government organ, they perform a public function, they are an integral part of a hierarchy of

state authority and most private schools receive state funding (see section 3.5.2.3 and Wiechers 1985).

Similarly, case law has established the application of administrative law principles to a number of seemingly private institutions, such as universities, the Johannesburg Stock Exchange, voluntary clubs and associations and churches.<sup>13</sup> In practice, the organs, powers and conduct of such bodies are to some extent governed by administrative law, but this does not mean they become government organs as a consequence of this. Such organisations remain private but they voluntarily accept administrative law principles into their constitutions. The reason for this lies in the unequal relationship of authority that exists within the hierarchy of these organisations. Likewise, although private school governing bodies are not 'state organs' per se, the rules of administrative law are nevertheless applicable by virtue of the unequal relationship of authority that exists within the school hierarchy. Thus, although the relationship between a private school governing body (or the proprietor) and the principal may appear to be based simply on contract, the principal is in a subordinate relationship vis-à-vis the governing body (see sections 5.4.1 and 5.4.3.2).

#### 5.2.5.1 Administrative functions

Governing bodies and school principals exercise a wide range of powers and functions that can be grouped according to three different capacities or administrative acts: legislative, judicial and purely administrative. This distinction is important because the law attaches different consequences to different administrative acts.<sup>14</sup> Therefore, this approach has been applied to functions in a private school for the practical purpose of understanding the legal nature of managerial acts performed by school officials.

##### (a) *Legislative administrative acts*

Legislative administrative acts are those which create *binding legal rules* which create, vary or terminate *general legal relationships* (Wiechers 1985:91). According to Wiechers (1985:92-93), the following specific rules apply to legislative administrative acts: they create general relationships; there are specific rules of administrative law governing the repeal, amendment and

promulgation of legislative acts; the power to subdelegate legislative powers is limited and legislative administrative acts must not conflict with a superior Act such as an Act of parliament. In the school context, school governing bodies and principals perform legislative acts when they create, amend and implement school policies, school rules and regulations which constitute the domestic subordinate legislation of the school.

*(b) Judicial administrative acts*

Judicial acts, which are more difficult to distinguish, can be defined as the 'authoritative determination and application of the law by a government organ in the settlement of a legal dispute or uncertainty; this finding and application are binding and final and can be effectively carried out' (Wiechers 1985:102). School governing bodies are sometimes called upon to act 'judicially' (that is, in a manner having some attributes of formal legal proceedings). Therefore, 'judicial' administrative acts are those acts which are performed when an internal organ, with the necessary authority to render binding decisions, adjudicate the conduct of an inferior organ or settle a *legal* dispute. The decisions made are binding. However, in practice, these acts are generally performed by courts according to specific requirements and therefore judicial administrative acts are seldom performed in schools. The most common administrative act, the purely administrative act, which contains judicial and administrative elements, is discussed next.

*(c) Purely administrative acts*

Purely administrative acts are all those acts which are neither legislative nor judicial. These may be described as executive acts which are performed on a daily basis. The distinction between purely administrative acts and legislative acts can be expressed as the difference between the general and particular. A legislative act is the creation and implementation of a general rule without reference to a particular case or situation, while purely administrative acts apply to a particular situation. Moreover, they are acts performed for the purpose of creating, varying and terminating *individual legal relationships*. Within the school context, most of the internal acts that take place on a day-to-day basis fall within this category. However, when dealing with purely administrative acts, a

distinction is made between those acts which do not affect the rights, privileges and interest of others (eg, the legitimate allocation of work amongst staff members) and those which do infringe on the rights and interest of others (eg, if a teacher is suspended from his or her duties). In the case of the latter, the actions taken are subject to greater judicial scrutiny in order to ensure their legality. If an individual's rights and interest have been infringed in an unjustifiable way which result in unfair and unreasonable consequences, he or she may appeal to an internal body for reconsideration or failing that, a court of law (see Bray 1988:54).

#### 5.2.5.2 Administrative law principles

There are a number of legal principles that serve to regulate administrative law relationships. The main aim of these principles is to ensure that functions, duties and powers exercised by persons in an authoritative position are carried out in a lawful manner, and to protect the rights and interests of individuals in a subordinate position. In this section only a few important legal principles are considered.<sup>15</sup>

##### (a) *Delegare delgatus non potest*

In legal terms, the division of powers and functions rests on the *principle of delegation*. Delegation is aimed at a division of labour. Because it is not possible for all the tasks of a school to be carried out by a single person or body, it is necessary to transfer or delegate certain powers and functions to another person or body for implementation. Transfer of powers and functions is subject to the basic rule of administrative law that a subordinate may transfer a function involving the exercise of discretionary powers only if authorised to do so expressly or by implication. This is the *rule of delegare delegatus non potest* (Wiechers 1985:51), which translated means that a person to whom a power is delegated may not subdelegate to another person.

The basic forms of delegation include the simple mandate or instruction, deconcentration and decentralisation (Bray 1988:34). The simple mandate merely involves the person in authority instructing a subordinate to carry out a task. This form of delegation is often used because the person to whom the task

is delegated does not take any responsibility for the decisions or actions of the delegans (the higher authority). Ultimate responsibility lies with the superior body or organ. For example, if the principal instructs the secretary to type a letter.

Deconcentration of activities is perhaps the most common form of delegation in a school whether private or public. This form of delegation exists within the different levels of internal organisation whereby certain powers and duties are delegated to a person lower down in the hierarchy. For example the governing body delegates to the school principal. Wiechers (1985:52) states that within the hierarchy it is often necessary to effect a deconcentration of powers and functions because it becomes impossible for the principal organ in the hierarchy to exercise all the powers and perform all the functions. For example, in a private school the religious order or governing body (the delegans) transfers powers and functions to the school principal who acts on behalf of the superior organ. Thus, the governing body, who is ultimately responsible for virtually every aspect of the conduct of a private school, delegates functions and duties to the principal, who is then able to carry out his or her management role. The high degree of discretion granted to principals does mean that they are responsible for things that go wrong through internal mismanagement. In other words, if principals (the delegatee) fail to use their discretion properly, they are accountable for their actions and decisions. In the case of decentralisation, the delegation occurs between different structures and therefore exists outside the vertical lines of authority. In other words, delegation takes place between different substructures. In terms of private schools a good example of this may be found in the relationship between a church body and a school. The church (which is a separate structure) may delegate powers and functions to the school governing body. Bray (1988:39) notes that when dealing with decentralisation, it is more correct to speak of a division of powers rather than delegation of powers. The main idea behind this form of delegation is that the superior body must respect the subordinate organ as an independent body.

Delegation is important because it ensures that the principal is empowered with the necessary authority to manage the school effectively and efficiently. Thus, although the principal has a separate legal position and responsibility for some aspects of the school, he or she is ultimately responsible to the school governing



body. According to Bray (1988:43), 'sound judicious delegation of powers creates good management policy: it provides solidarity, creates a team spirit and opens channels of communication'.

(b) *The Ultra vires doctrine and the principle of legality*

A fundamental rule of administrative law is that a person performing an administrative action must act within the powers conferred on him or her. The *ultra vires* doctrine is a common-law principle used to denote the framework within which persons in authority are required to exercise the powers and duties entrusted upon them in terms of empowering legislation (Bray 1988:58). If the author of any administrative act exceeds the bounds of his or her authority, he or she is said to have acted *ultra vires*. Therefore, school governors and principals are required to act within the bounds of their authority and to use their powers in the prescribed way. Actions taken by school governors or principals that are *ultra vires* (beyond their authority) may result in the action or decision being rendered invalid or void. For instance, a private school principal who suspends a teacher without consulting the school governing body will be acting *ultra vires*.

However, in interpreting the content of the *ultra vires* doctrine, the question arises whether an administrative act will be valid simply if it is performed within the framework of the empowering legislation. In this regard there are two approaches to the concept of *ultra vires*. According to a narrow interpretation, an administrative act will be valid if it is merely performed within the framework of the authorising legislation and it complies with any formal procedures laid down. However, such a narrow and legalistic approach negates the general principle of legality which requires that an act not only be performed within the scope of the conferred powers and the requirements in the empowering legislation, but also according to the rules of common law. On the other hand, a wide interpretation of the *ultra vires* doctrine means that proper attention is given to the law in its entirety. In other words, attention is not only given to legislation (empowering laws) but also common law and case law. Thus, if the wide approach to *ultra vires* is adopted, the term becomes an overarching criterion for all the requirements for the validity of an administrative act. Then if an administrative act is performed in bad faith or with an ulterior purpose it may be deemed to be *ultra*

*vires* even if it falls within the ambit of the empowering legislation (Bray 1988:59; Hosten et al 1995:1055; Wiechers 1985:174-178).

(c) *Natural justice*

Administrative law requires that school governors and their delegates provide certain procedural safeguards when decisions are made which affect others. Natural justice comprises common-law principles that must be observed when certain administrative decisions are taken or where discretionary power (that is a legal power) is exercised that could adversely affect the rights, privileges and freedom of others. They may be excluded by statute but, in general, the courts are reluctant to infer an intention to exclude them in the absence of an express provision. According to Baxter (1984:538), the objects of the rules of natural justice are to promote accurate and informed decision-making, to ensure decisions are taken in the public interest and to cater for important procedural values.

The content of the rules of natural justice has crystallised into two basic principles namely, the *audi alteram partem* ('hear the other side') rule and the *nemo iudex in sua causa* ('no one may judge in his or her case') rule. First, the *audi alteram partem* rule requires that a person have an opportunity to be heard. A fair and proper hearing presupposes that the person be given adequate information and time to prepare his or her case, the right to be present at a hearing and the right to have legal representation. Secondly, the *nemo iudex in sua causa* rule requires impartiality and lawful justice. This principle is embodied in the words of Lord Hewart CJ who stated that 'it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done', and which has been quoted often by the South African courts (Baxter 1984:557). The rule that no-one may be a judge in his or her own case is included in the requirement of impartiality. Thus, an administrative body that has a personal interest in the matter which it must exercise may be regarded as partial (Wiechers 1985:214).

In essence, the application of the rules of natural justice is to ensure that an administrative organ 'duly applies its mind to the matter' to ensure legality. An organ that does not give an interested party an opportunity to put his or her case,

or that is biased, cannot be said to have applied its mind (Wiechers 1985:227). The rules of natural justice are now embodied in section 24 of the bill of rights and provides inter alia for lawful, fair and just administrative justice (see Appendix C on administrative justice in the 1996 Constitution).

(d) The *bona fide* principle

All administrative acts must be performed in good faith. This means that when an administrative organ performs its tasks, it must apply its mind impartially to all the requirements for validity in order to ensure that they are legal and valid (Wiechers 1985:254). In other words, the *bona fide* principle applies to all the requirements for validity since it forms the basic rule underpinning the legal validity of all administrative acts (Bray 1988:69).

### 5.2.6 Summary

This section has explored the legal status of private schools and the legal nature of school governance. The legal organisation and structuring of private schools is not mandated by law. Private schools may be organised as education trusts, non-profit organisations or profit-making corporations. While most typical private schools are managed by a board of governors or directors, private school sponsors (eg, churches) may limit school governing bodies to an advisory function and maintain final autonomy over important matters.

In the area of school governance, private schools enjoy a great deal more autonomy and self-governance than their public school counterparts. The diversity of private school governance reflects the different patterns of ownership (section 5.2.1) and the historical development of private schools (chapter 2). The autonomy enjoyed by private schools has enabled them to develop governance structures and styles of management to suit their needs and mission. In terms of the 'law making' role of governing bodies, the powers and duties of private school governing bodies cannot be easily generalised as they are determined by corporate and contract law, and the legal instrument which pertains to each particular school. In addition to this body of private law, the powers, duties and functions of school governors and managers are governed by a vast body of

administrative law principles, because of the 'public' nature of private schools and their position within the state education system.

### **5.3 PRIVATE SCHOOL FINANCE**

There is no doubt that funding is one of the most controversial and perplexing issues facing private schools today. Private school funding is an important *public* policy issue which has implications for the governance of private schools and their future existence. As elsewhere in the world, debates about the nature of private school funding, the desirability of state funding of private schools and the alternative options facing private schools are receiving a great deal more public attention in light of changes taking place in education and the overarching commitment on the part of the government to address gross inequalities in education, the source of which has invariably been inequitable funding.

What follows is a discussion on some key issues relating to the current legal position of private school funding. No attempt has been made to provide an in-depth economic analysis of private school funding but rather to define the legal parameters in which public funding to private schools is made. Specific attention is given to the nature of private school funding in South Africa, the question of whether private schools should receive state funding, and if so, in what form, and the possibility of private schools that are coming under increasing financial pressure, becoming integrated into the public school sector. To shed light on these issues, the experiences and policies of other countries are examined.

#### **5.3.1 The nature of private school funding in South Africa**

The most important sources of funding for private schools, the ratio of which varies between schools, comprise school fees, a state subsidy and donations (table A5). The majority of private schools depend on compulsory school fees. Of the schools surveyed, 80.9% of the schools receive their *main* source of funding through schools fees with only 13.2% percent receiving their main funding from the State and 2.9% from donations. Two schools indicated that their main source of funding was from fund-raising and one other listed its main source as a trust fund and investments. Although the primary source of funding is school fees, private schools do depend on a number of other sources for funding; in other

words, a combination of school fees, donations and fund-raising. School fees vary substantially in the private sector. They range from less than R4 000 per annum per child to more than R20 000 per annum per child (see table A6).

Private schools in South Africa have generally had access to state funding. Since the 1800s provision was made for private schools to receive a state subsidy or grant provided certain conditions were met (see chapter 2). However, in an attempt to advance state schooling, state subsidisation was terminated in the 1950s. As of 1986, private schools once again became eligible for state subsidies. However, during this period, the approach to state funding to private schools shifted insofar as it was used as a strategy to exert control over private school student enrolments (eg, see section 2.2.5.2). For this reason it is suggested that many private schools preferred to manage without state funding. However, in practice many private schools depend on financial support from the State. According to Bot (1992:85), from 1986, state funding increased from R25m in the 1986/87 financial year to R45m in 1988/89 to R70m in the 1990/91 financial year.

By comparison, the funding which is to be disbursed to private schools for 1996/1997 is estimated at R165m. However, the final figures and means of allocation have not been decided. For instance, according to the Gauteng Education Department, under which most of the private schools in South Africa fall, the financial allocation to private schools will only be confirmed after 24 March 1997 when the provincial budget will be tabled. It has also been noted that subsidies' payments for 1997/1998 will be based on the 1996/1997 enrolment figures and that no additional amount will be allocated should enrolment figures increase.

#### 5.3.1.1 Direct subsidisation

In the schools surveyed, only five of the respondents do not receive a state subsidy with 53% of the schools receiving 45% subsidy as shown in table A7. Of the respondents that marked 'other', eight schools receive a subsidy of 50%, two schools 20%, one school 70%, one school 75% and six schools less than 15%. One school had applied for a subsidy and was waiting for a reply while the remaining respondents were either not sure of the percentage or did not say

what the percentage was. However, table A7 does provide evidence of the range and extent of state aid to private schools. In terms of direct subsidisation, private schools can be classified into three categories: private schools receiving virtually no assistance (less than 25%), schools that are partially subsidised (45%) and schools that are highly subsidised (70% and more).

#### 5.3.1.2 Indirect subsidisation

In addition to direct subsidies, private schools have also been subsidised indirectly as a result of tax relief. Private schools pay no tax on income from the private sector or on school fees. In terms of section 18A of the Income Tax Act 58 of 1962 donors receive a tax benefit for donations to private schools. Private schools have also been exempted from paying property rates.<sup>16</sup>

### 5.3.2 Legal implications of state funding for private school governance

Section 32 of the 1993 Constitution makes provision for the establishment of private schools. This provision has also been included in section 45 of the South African Schools Act of 1996 which states that:

...any person may, at his or her own cost, establish and maintain an independent school.

This does not preclude the State from funding private schools, however. Provincial legislation gives the Member of the Executive Council (MEC) of each province the power and authority to grant subsidies to private schools and to lay down the requirements for doing so.<sup>17</sup> To date, these requirements have not been determined.

#### 5.3.2.1 Conditions for subsidisation

Although policy decisions about the financial management of private schools (eg, in respect to the school budget and tuition fees) are vested in the governing body, private schools do not operate completely free of state regulation. In terms of private school funding, fiscal accountability to the education department is an accepted consequence of state funding. Control measures relating to financial accountability are found in provincial education legislation. The main legal

requirements concerning private schools' eligibility for a state subsidy can be summarised as follows:<sup>18</sup>

- Private schools must apply annually in writing to the Head of the Education Department for a subsidy.
- Private schools must comply with prescribed conditions laid by the MECs (see section 5.2.2).
- Private schools who operate as profit-making organisations will not receive subsidies.
- The Head of the Education Department has the power to reduce or terminate a private school's subsidy.

#### 5.3.2.2 Public accountability

The regulations pertaining to the financial statements of private schools are the same for public schools and can be summarised as follows:<sup>19</sup>

- Private schools must keep records of money received and spent, and of assets, liabilities and financial transactions.
- A financial statement must be drawn up within three months after the end of the financial year.
- Financial records and statements must be audited by a person registered as an accountant.
- The proprietor must submit an audited copy of the audited financial statement to the education department within six months of the end of the financial year.
- Financial statements must be made available to parents and educators of the school if they are requested.

It is a universally accepted legal principle that private schools receiving public funds have a legal obligation to demonstrate that the funds received are used for the purposes for which they are granted and are properly accounted for. Durston (1987:189-190) goes so far to say that it is prudent for private schools to introduce a form of self-regulation in order to avoid state intervention. However, while financial accountability for *public funds* is inevitable, the extent to which a private school, in terms of its legal status, should have to account publicly for its private financial affairs is a moot point. In terms of the survey response to the

statement that a private school should only have to account for its financial affairs insofar as it relates to income derived from State sources, 31.6% strongly agreed and 32.3% agreed. Only 18% of the respondents disagreed with 10% strongly disagreeing (table A8).

#### 5.3.2.3 State inspection

An important requirement for registration and obtaining funding is that private schools must meet certain standards and to ensure this they must allow themselves to be inspected by education officials. From the survey it appears that respondents accept that private schools should be required to meet certain requirements providing they are reasonable and relate to maintaining quality of education and preventing fly-by-night schools from operating. For instance in response to a question on whether State officials should be able to assess the way in which schools are managed for the purpose of quality control only 23.9% of the respondents said *no* while 76.1% said *yes*. Inspection of private schools by state officials is an accepted practice in most countries in which private schools operate.

#### 5.3.2.4 Relationship between subsidisation and autonomy

In view of the scope of state regulation on private schools, a particular concern that arises regarding state funding of private schools is the impact of such funding and the concomitant state regulations on the autonomy of private schools. Does more state funding imply more state control? Private schools inevitably have to weigh the cost of receiving funding in terms of control and limitations on their autonomy. Although most of the respondents agreed with the statement that the more State funding a private school receives the less autonomous it is, 20.5% of the respondents remained neutral and 25.8% disagreed (table A9).

The relationship between subsidisation and control has been demonstrated empirically by James (1991:359-370). In a study involving 35 countries, it was found that a positive relationship exists between subsidisation and control. According to James (1991:373), large subsidies to private schools are usually accompanied by substantial additional regulations. James notes that the



rationale for these regulations is that, once public funds are provided, society has a duty to exert some control over how these funds are spent, after all it is taxpayers money. Thus private schools are not able to use public funds in a manner that public schools would be prohibited. Moreover, it is suggested that the desire for control on the part of education state officials may also be part of the *raison d'être* for providing subsidies. Since it is not possible under the present constitutional dispensation to eliminate private schools, the State can increase its sphere of control and influence over them by means of subsidisation and the concomitant regulations.

### **5.3.3 Public funding of private schools**

In all countries the state plays a vital role in the finance and provision of education. However, the extent to which the state should finance and support private education is a hotly contested issue and one which has been the subject of numerous court cases. There are arguments for and against the public funding of private education but neither side appears to emerge persuasive because of the complex nature of private school financing and the important role played by private education in virtually all countries.

#### **5.3.3.1 Rationale for public funding**

The majority of South African private schools surveyed receive state funding (table A7). As the government comes under increasing pressure to deliver free, compulsory education to an ever-increasing school population and to address past imbalances and inequalities in education, the position of continued state funding of private schools is being seriously challenged. The question whether private schools should receive state (public) funds and, if so, on what basis is complex and the responses varied. In response to this particular survey question, 83.6% of the respondents said that private schools should receive state funding while only 16.4% said *no* to state funding of private schools. This is hardly a surprising result but one that needs to be taken into account when determining policy on state funding of private schools. Although several respondents said that private schools should *not* receive state funding, they qualified this by stating that private schools should only receive state funding if they meet certain requirements and if they are schools not for gain. Wealthy schools and schools

that are established to make a profit should not receive a subsidy. This is illustrated in the following comments:

Certain private schools serve the most affluent in society who have no problem with paying school fees.

Only if certain standards are maintained.

Only those which conform to the correct standards of education.

Only schools which meet certain minimum requirements.

Some independent schools are profit-making institutions and should not receive a subsidy.<sup>20</sup>

A distinction should be drawn between organisations for gain and those which are not for gain. The latter should be subsidised.

The arguments for and against state funding of private schools vary. The primary argument *against* state funding for private schools is that it takes vital funds away from the state school sector and, in so doing, contributes to elitism, social exclusivity and inequality. Given the financial constraints in education, some opponents consider it inappropriate to fund private schools with public money. There is also the concern that by eroding the financial support of state schools there will be a shift away from state school enrolments to private schools thereby exacerbating the division between state schools and private schools. This argument is not particularly convincing, given the small size of the private school sector and the fact that public schools are able to charge school fees thereby generating their own funds and not be totally dependent on state funding.<sup>21</sup>

In spite of arguments against state funding, there are equally compelling arguments why private schools should continue to receive state funding. One of the most common arguments advanced in support of state funding for private schools is based on the fact that private school parents are also taxpayers and as yet receive no tax relief. It is therefore argued that parents sending their

children to private schools are paying twice for education. This is borne out by the following comments:

The amount [of State funding] could depend on the needs of the school; by and large the parents are tax-payers.

Our parents pay taxes. We [are] relieving the burden on the State schools at the cost of our parents.

Because all parents pay taxes.

Parents are taxpayers and should get some return. They should also have a choice of school type.

Parents pay taxes for state education PLUS fees for independent schools.

Parents are taxpayers and are therefore entitled to a certain contribution from the government.

Similar arguments have been advanced in other countries, but Shapiro (1986:268) contends that the 'double taxation' arguments are 'fundamentally weak' insofar as the argument confuses an 'education tax' with a 'tuition bill'. The education tax represents a levy in support of what society has identified as a common good. The raising of this or any other tax does not entitle a citizen to an opting-out process. Moreover, the double taxation arguments implies that citizens without children would not be expected to pay taxes for education. Further support for this argument is found in case law. For example, in the US Missouri case of *McDonough v Alyward*,<sup>22</sup> a taxpayer whose child attended a religious private school, filed for a refund of that portion of his property tax which supported the public school. The parent argued that payment of such tax imposed a practical economic burden which interfered with his constitutional right to send his child to a private school. The Missouri Supreme Court denied his claim for a tax refund. While the Court sympathised with the financial burden of parents who choose not to send their children to a public school, the Court held that such a self-imposed burden is not violative of the constitution. By analogy the Court cited the case of bachelors, childless couples and corporations who paid taxes for the support of public schools and received no more benefit from

such taxes than did the parents in this case who chose to forego public schools. Likewise, the New York Supreme Court struck down a New York statute that allowed parents to deduct an amount from their income tax for private school tuition. The Court held that since 85% of the private schools in New York are religious schools, the statute had the effect of advancing religion, which is contrary to the Establishment Clause. However, in contrast to this case, the court in *Mueller v Allen*<sup>23</sup> upheld the constitutionality of a Minnesota tax credit plan that allowed parents a tax deduction for educational expenses incurred for their children. The difference in this case, however, was that the Court ruled that the benefit was provided for all students, regardless of whether they attended private or public schools. Grants and tax credits available only to parents of children who attend non-public schools are not permitted. Moreover, the majority of the Court held that State assistance to a 'broad spectrum of society' does not have the effect of supporting religion (McCarthy & Cambron-McCabe 1987:53).

Another closely related argument is based on the premise that private schools provide a quality education and that:

Independent education saves the State funding.

It saves the State a significant sum of money to help the private schools operate. 1% of the budget to educate 2% of the population.

The State saves money having pupils attend private schools

To answer the question whether private schools do save the State money requires a more thorough analysis of funding that is beyond the scope of this discussion. However, according to Bot (1992:84), state funding of private schools in 1988/9 represented a per capita figure of R431 for a student at a private school compared to the per capita expenditure in white state schools which was R2 538. This represents a considerable saving for the State.<sup>24</sup>

The issues of elitism, privilege and wealth are important when considering State funding. Opponents of private schools argue that private schools are socially, financially and academically elite and therefore should not receive public funding since this merely serves to promote social exclusivity and perpetuate inequalities.

In contrast, some respondents also argued that private schools should be funded for the following reasons:

Country [rural, private] schools cater for very poor and needy children.

To remove elitists stigma and make them more accessible to all. Pupils attending have parents who pay taxes and are entitled to assistance.

Without state subsidy private schools will become more elitist and accessible to rich only.

Contrary to the prevailing assumption that all, or for that matter the majority, of private schools in South Africa are elitist, many South African private schools do not fit the profile of an elite school. While elite schools do exist and do play a role in the reproduction and maintenance of power and privilege, they are far from being representative of the private school sector in general. Within the private school sector there is considerable variety. There are many private schools who are known for their strong traditions and academic excellence who serve the wealthy and often, middle class families, but, there are as many that serve disadvantaged communities. Unlike the UK, social class accounts less for the existence of private schools in South Africa, where religious values and ideology were the major driving forces behind the establishment of private schools (see chapter 2). The religious basis of schools has tended to make private schools inclusive rather than exclusive. In this regard, Catholic schools in general (which constitute the largest number of private schools) are neither elitist nor wealthy in terms of their enrolment patterns, fees or resources. However, the scant empirical evidence concerning the social composition of student bodies in private schools does not permit one to draw any substantial conclusions or comparisons about the social class factor, but, suffice to say that the entire social class and socio-economic spectrum is represented in both public and private schools.<sup>25</sup>

The survey also indicated that many private schools are not wealthy and are dependent on a state subsidy. Of the schools surveyed, 58.8% (77 schools) indicated that they were dependent on state subsidy and 41.2% (54 schools) are not dependent on a subsidy. One respondent added the comment that 'we would be in dire straits without it but we would make a plan'. It is argued that

withdrawing state funding could have the effect of rendering private schools even more socially exclusive. An immediate effect of withdrawing, or substantially scaling down state funding would be an increase in tuition fees. Contrary to common perception regarding private tuition fees, not all private schools levy high tuition fees. Of the schools surveyed, 47.8% of the schools had annual school fees of less than R5 000 with only 6% with fees over R20 000 (table A5). Moreover, in some cases the gap between fees in private schools and state-aided schools (the so-called 'Model C' schools) has closed; the latter depending more and more on 'voluntary' fees to survive. This is also true of other countries. For instance, Durston (1987:184) notes that the tendency to equate private schools with elitism denies the fact that private schools in Australia generally cater for a broad spectrum of society in terms of social class, intellectual ability and wealth. Likewise in Canada, Germany and Zambia few private schools are elite and socially exclusive.

Parents' rights with regard to their children's education and the issue of choice is another cogent argument used to support the notion of state funding to private schools. It is strongly believed that everyone is entitled to receive financial assistance regardless of whether it is for public or private education. This is expressed in the following responses:

The State has an obligation to all pupils in the country. Even pupils in private schools should be entitled to some assistance.

It is a **right** of every child to receive support. Private schools are performing a task on the part of the State.

We educate children who would otherwise have to be educated (paid for) by government.

Our parents pay taxes - A subsidy is not a privilege it is a right - also private schools provide quality education at minimal cost to the government.

States must support parents' rights to freedom of choice. There should be no tax penalty for doing this.

Although there is wide support for the rights of parents to choose private schools, there is less agreement over whether this right should be subsidised, however (Anderson 1992:222). The above comments raise the question of whether the State does, in fact, have a constitutional obligation to provide funding for all children based on their constitutional right to education irrespective of whether they attend a private or public school. Section 32 of the 1993 Constitution which provides a positive right to education and the right to establish private schools could be used to support the argument that the State has a duty to support all children's education. However, where this affirmative right can be used against the State is a matter that is yet to be settled by the Courts. However, in *Ex P Gauteng Legislature: In re Gauteng School Education Bill 1995*<sup>26</sup> Mahomed DP addressed the meaning of section 32. It was held that while section 32(a) does create a positive right to basic education, section 32(c) constitutes the protection of a fundamental freedom. In other words, it can be inferred from this that the State does have an obligation to provide basic education and that the State is constitutionally obliged to respect the freedom of choice with regard to education, but that it is not obliged to establish educational institutions based on a common language, culture or religion. Therefore, section 32(c) does not say that every person has the right to have educational institutions established by the State. Instead, it provides that every person shall have the right to establish educational institutions based on language, religion or culture. Section 32, however, does place a duty on the State to establish a system of state education and a duty not to take legal steps to prevent the establishment of independent institutions, but the State does not have a constitutional obligation to provide for and support private schools.<sup>27</sup>

Countries have responded to the 'choice argument' in different ways. Durston (1989:240) notes that some countries have merely condoned and acknowledged the right to choose, for example the USA, while others have actively expanded and facilitated the process, for example Denmark and France. With regard to Denmark, the Danish Act on Free Schools and Private Basic Schools fully conforms with the international obligations contained in the UN Covenant on Economic, Social and Cultural Rights in so far as the Danish authorities facilitate the establishment of private schools by subsidising part of the costs. In Denmark, schools with a religious orientation may be established subject to certain

conditions laid down in the Act on Free Schools and Private Basic Schools. The schools are subsidised by the Danish State when conditions are fulfilled. The State subsidises up to 85% of the costs. According to Article 1 of the Act, free schools and private schools must direct their education so that it conforms with the standard required in public schools (Fledelius & Juul 1992:30-32). Likewise in France, the Constitution provides for the right to establish private schools. However, according to Cairns and McKeon (1995:118), this gave rise to the accusation that the freedom of choice in education was restricted to those who could afford private school fees. For this reason, a number of laws were adopted to provide a system whereby the State provides levels of financial support to private schools which is commensurate with the extent to which private schools submit to official monitoring and quality control measures.

#### 5.3.3.2 Legal position in an international context

The controversial debate on whether private schools should receive public funding and the form this funding should take has received world-wide attention. The purpose of this section is to examine the nature of private school funding in other countries in the light of the developments in law and educational practice and to consider whether these developments could be of any relevance and assistance to education law and private schools in South Africa. The following examples illustrate the different and controversial approaches to funding private schools with public money as well as universal trends and universally accepted legal principles and practices.<sup>28</sup>

##### *(a) France*

The question of providing private schools with public funding has been a source of considerable conflict in France. Prior to 1951, private schools, most of which are Catholic schools, had no direct legal claim to state support (Teese 1989a:133-134). According to Teese (1986:247), the constitutional separation of the Church and State compelled Catholic education to function as a market sector alongside state-provided schooling. The beginning of state aid in 1952 brought an end to this situation. The government acknowledged that it was dependent on the Catholic Church for the provision of education, particularly at the secondary level. Private schools initially received state aid in the form of state



scholarships to private schools (Marie Law 1951) and education allowances paid to parents' associations under the Barange Law of 1951. In 1959 the Debre Law set out a more formal system of state aid. The system instituted permitted individual schools to enter into a contract with the State for the supply of 'public instruction'. According to Teese (1989b:14), the contract system was introduced to enable private schools to associate with the national education system and to receive an appropriate level of funding, while retaining a measure of autonomy from central and other authorities. It also enabled Catholic schools (ie, the majority of private schools) to grow with the changes of the post-World War II era rather than be left behind in the wake of rising education costs and declining church resources. In law and in practice the contract system is complex and has been subject to continual change since 1959. Initially, schools could choose between two types of contract. The 'contract of association' meant that private schools were open to all, free and modelled on the public school curriculum. In return, teachers salaries and other running costs were paid by the State or relevant education authority, which means the State exercises a right of veto and, technically, teachers are employees of the State. A 'simple contract' system was also introduced to appease Catholics, who were concerned about the extent of state involvement. This system thus reformed the State's veto of teacher appointments and the hiring and firing rights of the school head were retained. Although teachers' salaries and a proportion of the running costs were paid by the state, this more liberal contract left it to the discretion of the local government to meet the balance of operating costs. Primary schools, whose costs are lower, were encouraged to take the 'simple contract' because it allowed more freedom but less financial security (Teese 1986:248-249). During the 1970s the contract systems were revised. The 'simple contract' became a permanent option and the autonomy of schools under the 'contract of association' was extended. The effects of the Debre-Pompidou Law (1971) and the Guermeur Law (1977) were thus to reduce the distinction between the two types of contract (Teese 1986:249).

*(b) Germany*

Most of the private schools in Germany can exist only because they receive public funds (Gellert & Ritter 1985:346). Although the financial position of private schools in Germany varies, all *Länder* (provinces) have granted certain private

educational institutions the right to financial assistance following the ruling of the Federal Administrative Court that confirmed in 1966 the right of 'substitute schools' to state financial aid (Weiss & Mattern 1989:170). The North-Rhine-Westfalia *Länder* has gone so far as to write this obligation into its constitution.<sup>29</sup> The law recognises two kinds of private schools, that is, 'substitute schools' (*Erstazschulen*) and 'supplementary schools' (*Erganzungsschulen*). According to a definition of the Constitutional Court, the former are 'private schools which... serve as substitutes for schools which already exist or which are planned within the state'. Supplementary schools are defined as private schools which have no existing or planned equivalent in the respective *Land*. The constitution stipulates several preconditions for 'supplementary schools' to exist and it is only these private schools that are legally entitled to receive state funding (Gellert & Ritter 1985:345-346; Weiss & Mattern 1989:168-169). Subsidies to the private sector take two forms; the first is a direct subsidy from public authorities to the institution; the second is indirect through financial concessions to parents. The direct aid consists of a lump sum which may be calculated on the basis of student numbers or the number of teachers depending on the *Land*. In addition there are subsidies to cover personnel costs which range from 75% to 85% of the costs incurred (Neave 1985:331).

(c) *Netherlands*

In the Netherlands, the 1920 Law of Education, which implemented the 1917 Constitution, enabled groups of parents to open their own non-profit private schools by requiring the government to provide almost all initial capital costs as well as ongoing current expenses (James 1989b:181). Two conditions had to be met for private schools to receive financial support. The law provided that the body proposing to set up a school must have a legal personality and that there had to be a specified number of students (Neave 1985:329). In the case of elementary schools, the municipality had to provide the group with a building and miscellaneous inputs while the central government paid teacher salaries. The requirements for secondary schools are more involved because of the higher capital costs. The Minister of Education is required to set out a three-year plan which specifies what the state, municipal and private schools need in order to be supported for the three-year period. To this end, each group needs to convince the Minister of their specific needs (James 1989b:182). The Netherlands is thus

unique in that legislation governing the financing of private schools is based on the concept of 'automatism'. Once the conditions for establishing a private school have been met, the relevant funding authorities are automatically obliged to give support.

*(d) England*

Private schools in England have long been criticised for their elitism and social divisiveness (Salter & Tapper 1985:42-69) and their existence remain a source of deep political debate. While the Conservative Party has been clearly in favour of supporting and advancing a more competitive, privatised and market-oriented form of education (Edwards, Fitz & Whitty 1985:29), the Labour Party has advocated a radical scaling down of the private sector. However, in spite of some opposition to private schooling, private schools remain a significant feature of the education system and will continue to retain a secure place in view of the recognition given to the rights of parents to choose their children's education and to establish private schools.<sup>30</sup> In order to further enhance the private school sector and to widen its availability, the Conservative Party introduced the Assisted Places Scheme, which came into effect in September 1981 by way of the Education Act of 1980.<sup>31</sup> This is a useful illustration of indirect aid to private schools. The scheme is intended to enable 'pupils who might not otherwise be able to do so to benefit from education at an independent school'. Between 5000 and 6000 places were to be made available each year to academically able children whose parents could not afford full fees. Children are selected for places on academic merit according to a means test. The schools in the scheme reduce or waive the fees charged to parents of academically eligible children and then reclaim the residual cost of the places from the central government (Edwards, Fitz & Whitty 1989:1-3). The scheme was justified as an extension of parental choice and an opportunity to restore and protect the nation's supply of talent. Its critics have viewed the scheme as a 'massive vote of no confidence in state education', and 'an offensive public declaration by a government that the national system of education is incapable of providing for our most able children' (Edwards, Fitz & Whitty 1985:30).

(e) *Australia*

According to Smart and Dudley (1989:105), state aid to private schools in Australia has also been one of the most 'acrimonious and bitter political issues to divide Australian society for more than a century'. A brief overview of the shift in policy on state aid is useful for understanding the complexity of the current situation.

State subsidies to private schools (mostly church schools) were terminated in 1877 with the introduction of 'free compulsory and secular' schooling. The result was that the Catholic minority chose to create and pay for separate schools in each state while the vast majority of Protestants embraced the new free state schools. In 1952 a law was passed allowing small tax deductions. A turning point was reached in 1963 when the Prime Minister, Robert Menzies, in a bid for Catholic votes, introduced state aid to private schools by way of a grant to build science laboratories for both state and private schools. This was later supplemented with a library scheme which further increased state aid to the private sector. In 1969, the Minister of Education, Malcolm Fraser, also introduced a scheme of federal aid in the form of a per capita grant which was open-ended and not limited to building schemes. When Fraser became Prime Minister, financial support to the private sector was supported and extended. However, subsequent Labour governments sought to reduce the flow of state aid to the private sector, for example, by basing the grant on the *needs* of individual schools, and to completely phase out aid to wealthy private schools. Such attempts were met with strong opposition and were thus never fully realised. In 1984 the Hawke government (1983-1988), while keen to reduce state spending on private schools, ended up with a funding policy for schools that guaranteed funding for private schools.<sup>32</sup> Faced with a political dilemma, the government chose to find additional money rather than redistribute funds away from private schools. Wealthy private schools, who were at risk of losing all of their subsidy, were guaranteed that their existing grants would be maintained (Smart & Dudley 1989:110-117; Edwards, Fitz & Whitty 1985:35-37). Hence, in Australia public funding of private schools from Federal and State governments is now accepted, but nonetheless a controversial practice. Federal support is based on a per capita grant while state support has a per capita grant which may be paid as a flat rate or calculated on assessment needs of schools (Durstun 1989:240).

Moreover, the courts have confirmed the legality of payments to private schools provided they meet certain conditions. In 1981, the High Court ruled that as long as public moneys are distributed equitably and not used for the purpose of creating one state-sponsored religion, there is no breach of the Australian Constitution. In this regard, although the Australian constitutional language on the separation of church and state is similar to the US Constitution, the Australian courts have adopted a less restrictive interpretation of their constitution than the USA (Lowe Boyd 1987:164).

*(f) United States*

The policy of public funding to private schools, both religious and non-religious, is complex and complicated by the fact that state constitutions differ from each other and from the Federal Constitution. Therefore, one form of state aid to private schools that is made permissible under the Federal Constitution may or may not be valid under the constitutions of various states (Valente 1994:553). There are two main constitutional barriers to public funding of private schools in the USA. First, there is the basic principle that prohibits the use of public funds for private purposes or gain. The second obstacle is centred on the Establishment Clause, which prohibits aid to religion. This has significant implications for private schools since approximately 85% of private schools are church affiliated, of which 75% are Roman Catholic (McCarthy & Cambron-McCabe 1987:48).

Notwithstanding these two objections, most states do provide a variety of types of financial aid to private schools. Although there is no direct public funding to private schools to assist them to operate, especially if they are religious schools, there is judicial endorsement for state funding to private education provided that it benefits the student rather than the institution (McCarthy & Cambron-McCabe 1987:49). In 1985, thirty-eight states provided public aid indirectly to private education in the form of transportation services, the loan of textbooks, testing programmes, special education services and guidance counselling (Kowalski & Reitzug 1993:147-148). For example, the Supreme Court has on numerous occasions relied on the 'child benefit doctrine' in upholding the use of public funds to provide transportation services and textbooks for students attending private schools.<sup>33</sup> However, while the courts have interpreted the Establishment

Clause to allow public funds to support students at private schools, various states have invalidated such actions as violating state constitution mandates. For example, in 1981, the California Supreme Court called the 'child benefit doctrine' 'logically indefensible' in striking down a state law that provided for the loan of textbooks to private school students<sup>34</sup> (McCarthy & Cambron-McCabe 1987:49). In determining whether aid to church schools has the effect of advancing or inhibiting religion, the courts examine whether the aid is direct or indirect and who are the beneficiaries of the aid (Levin 1990:28).<sup>35</sup>

(g) *Canada*

Similar indirect funding to private schools is found in Canada. While there are no direct subsidies to private schools, most provinces subsidise private schools indirectly. However, public funding for private schools vary from province to province. The provinces of Alberta and Quebec provide the highest levels of financial support to recognised private schools. Little financial support is given to private schools in Newfoundland, New Brunswick, Prince Edward Island and Ontario, for example (Mackay & Sutherland 1990:177).<sup>36</sup> However, an anomaly exists in Ontario whereby most Catholic schools are classified as separate schools which form part of the public schools sector, a status that is not granted to other religious minorities.<sup>37</sup> These schools are therefore funded by the state while at the same time maintaining their independence and distinct religious character. The funding of Roman Catholic separate schools is a highly controversial matter and has been the subject of litigation for the past few decades. Opponents argue that the special status of Catholic separate schools is discriminatory on legal and moral grounds. In one of the first cases to test the constitutionality of funding to Roman Catholic schools, the Ontario Court of Appeal was requested by the province to deal with the question of whether Bill 30, which was intended to amend the Ontario Education Act to provide full funding for Roman Catholic schools was inconsistent with the Constitution of Canada and the Canadian Charter of Rights and Freedoms. The Ontario Court of Appeal concluded that the proposed Act was constitutional and that it was supported under the Charter. On June 25, 1987, the Supreme Court of Canada unanimously upheld the constitutionality of Bill 30 in *Reference re Bill 30, an Act to Amend the Education Act*. The Court held that Bill 30 was a valid exercise of the provincial power to add to the rights and privileges of the Roman Catholic

separate school supporters in terms of section 93 and 93(3) of the Constitution Act of 1867 and that it was protected from Charter review (MacLellan 1995:64-65).

More recently, the constitutionality of public funding of Roman Catholic separate schools was challenged in terms of sections 2(a) and 15 of the Canadian Charter in the case of *Adler v Ontario*.<sup>38</sup> *In casu*, the appellants, Jewish and Christian Reform parents, unsuccessfully brought an application seeking funding and health support services equivalent to that provided in Ontario public and Roman Catholic separate schools, which receive tuition-free education and health support services. The Court of Appeal held that such support neither infringed the applicants' right to freedom of conscience and religion nor their right to equal protection and benefit of the law under section 2(a) and 15(1) of the Canadian Charter of Rights and Freedoms. In dismissing the appeal, the Court held that, because Roman Catholic funding is consistent with the Charter, it cannot lead to a conclusion that a failure to support education in religious private schools contravenes the Charter. Despite the unfairness of this disparity in treatment received by Roman Catholics and other religious minorities in Ontario, it is a constitutional anomaly rooted in a political compromise made by the Confederation in 1867 (Wiltshire 1994:122-125).

(h) *Italy*

Italy is included here as an example of a country in which private schools receive virtually no financial support from the state. In terms of article 33(iii) of the Italian Constitution 'organisations and private citizens are entitled to found private schools and educational institutions, *with no charge to the State*' (italics added). However, state funding is provided to private schools through a number of direct and indirect channels. In this regard a distinction is made between 'wholly private schools', both primary and secondary, that are operated by individuals or private bodies, which have no legal recognition and receive no funding. On the other hand, 'equivalent status schools', which are run by private organisations and church institutions, but not private individuals, are legally recognised and are eligible for state funding. These schools must comply with a number of prior conditions and curricular programmes must be the same as state schools (hence the term 'equivalent'). Therefore, the constitutional principle 'with no charge to

the State' is interpreted as meaning that the state has no legal obligation to fund private schools and that it cannot do so in a general way, but there is no absolute prohibition (Palomba 1985:364-369).

*(i) African countries*

According to Gotkin (1993:29), forty-six out of fifty-eight African countries which are listed in the 1991 Unesco Report have private schools. These schools are usually established either as mission schools or schools for expatriates. Since their independence, many African countries have experienced a substantial growth in the demand for private schooling. This is partly a result of the perceived decline in the quality of education offered in public schools and the shortage of schools. For example, in Zambia, private schools have been accepted and recognised because of the problem of access to primary and secondary schooling, even though they are regarded as an anathema to the humanist-socialist policy, especially profit-making private schools (Kaluba 1986:165).

#### 5.3.3.3 Conclusions

The following conclusions can be reached on the basis of international experience in respect of public funding of private schools. First, this cursory analysis demonstrates that the universal trend is to provide some form of public funding to private schools. Opposition to the subsidisation of private schools has failed to put a stop to public funding of private schools. For example, in 1983 the Labour Party in Australia retracted its policy of reducing subsidies to private schools and in Britain the Labour Party backed down on its policy which called for the abolition of private schools. Likewise in France, attempts to withdraw state funding were met with vigorous opposition, which resulted in the resignation of senior ministers (Teese 1989a:133). Secondly, it is evident that a mixture of both direct and indirect forms of aid appear to be supported as a means of meeting a wide range of needs within the heterogeneous private sector. Thirdly, the basis for providing public funds to private schools is underpinned by the constitutional right of choice and the fact that private schools are providing an essential service which the state cannot achieve on its own. Fourthly, while it is evident that state funding of private schools is needed to maintain private schools and to extend



facilities, it brings with it a measure of increased state control. Invariably, private schools must meet certain conditions prior to receiving a state subsidy, which may relate to student numbers, staff appointments, curriculum and inspection. However, while subsidisation is generally accompanied by an increase in state regulation, a state is in a position to control private schools even without subsidisation.

#### **5.3.4 Forms of state funding to private schools**

The discussion so far presents some of the arguments for providing private schools with state funding. The desirability of providing private schools with state funding raises a further question about the form this funding could take. state funding of private schools may take a variety of forms ranging from direct assistance, for example a direct subsidy, to indirect assistance, for example tax deductions.

The most obvious form is when the state makes a direct contribution to the school. Two approaches to direct funding are to provide a subsidy based on a *per capita* grant that is equal for both state and private schools and without a limit on the number of students for whom the grant can be claimed, or to base the subsidy on the *wealth and needs* of the individual school. Tables A10 and A11 show that the respondents favoured State funding based on a per capita grant rather than on the needs of the school. These two questions posed some difficulty as it was also evident from the number of respondents who were neutral that some were not sure of the implications of each approach. However, it is also not surprising that more respondents were in favour of a per capita grant as this is the most equitable form of subsidisation. In terms of this option, an equal amount would be allocated for each child and all schools would benefit. Private schools are thus in a better position to contract more students by retaining subsidised fees and wealthier schools can use more of their own funds to improve facilities still further. The latter option would result in selective subsidisation whereby schools that are in most need of state support would receive funding which, in practice, means that many private schools would not be eligible for support if they are deemed to be sufficiently financially independent. The difficulty of such an approach lies in developing criteria for determining the needs of a school and applying a means test.

In addition to the direct state subsidy, there are other alternative options in the form of indirect grants such as education vouchers and tax credits. The *voucher system*<sup>39</sup> is one form of indirect aid to private schools that has been widely canvassed in a number of countries, for example, it operates in the US State of Vermont and in the Netherlands (Gotkin 1993:39). The voucher system is based on the principle that parents are given a voucher worth a certain amount which can be spent on a school of their choice, either private or public. In this way, public funding for education is made available to private schools. Another option is to provide taxation credits. This essentially entitles parents to an income tax deduction for a certain amount of the expenses that are incurred in sending their children to private schools. The voucher system has evoked considerable criticism.<sup>40</sup> The most common objection to the voucher system is that it would undermine the public school system by drawing funds and students away. The advantages and disadvantages of these options are subject to considerable debate and would require close scrutiny prior to consideration for South African schools.

#### 5.3.4.1 Future funding policy for South African private schools

Given the controversial and complex nature of private funding, there is an urgent need for a national policy on private school funding which is negotiated and developed within the context of the new constitutional dispensation. From the preceding discussion on the nature of private school funding in the international context, it is clearly evident that most countries recognise the *need* for and *value* of funding private schools, whether directly or indirectly, in order to ensure the continued provision of good quality education (which state education authorities alone cannot provide) and diversity within the education sphere.

In this regard, the Independent Schools' Council in South Africa has proposed that the most equitable method of subsidising private schools is to use a single level subsidy based on a formula that will generate a per capita amount that will go towards the basic education of children registered in non-profit private schools that do not discriminate on the ground of race and that maintain satisfactory academic standards. It is further suggested that enrolment figures can be weighted to take into account differential costs as well as the need for redress. The formula proposed is the following:

$F = E(t/R) + B$  where;

F = per capita funding

E = weighted enrolment

t = the average cost of a teacher, excluding the standard costs of administrative and support staff

R = agreed teacher : student ratio

B = money available to redress backlogs, based on an index of needs.

It is suggested that such a formula would enable the state to meet the fundamental right to basic education while the additional allocation (B) would facilitate the relationship between the state and the private sector (Henning 1996:1-6; personal communication 9 December 1996).

### **5.3.5 Issues concerning integration**

It has already been mentioned that the continued existence of many private schools depends on financial support from the State. Therefore, many private schools would be faced with the possibility of closure should the State change the current practice of state funding to private schools. Schools in this position would need to consider other options, including becoming integrated into the state sector which is now a more feasible possibility since the drive to be separate from the State is no longer as acute as it was during the apartheid era. Present legislation does make provision for private schools to convert to state schools, but not vice versa (section 49 of the South African Schools Act of 1996).

In response to the question of private schools becoming integrated into the public school sector if they experienced serious financial difficulties, 52% of the respondents said they would consider the option while 46.8% said *no* to integration. Reasons given for not choosing this option are:

We believe that our religious foundation is the most important element in the make-up of this school and would not want to lose this.

Too much autocracy.

We believe strongly enough in the type of education we offer to survive - but likelihood of being forced into such a decision is remote.

We have been independent and successful for 120 years - the parents would do all in their power to preserve this.<sup>41</sup>

I firmly believe that this is not applicable in the case of prominent private schools who run as businesses and who are offering a good, proven product.<sup>42</sup>

Probably not. We have never been part of the public sector and we value our independence.

It is interesting to note that some schools who indicated that they were dependent on a state subsidy at the same time said they *would not* consider becoming integrated into the state sector. The following responses provide the reasons for this stance:

Too prescriptive and too compromising on Christian values.

The school has been private since its founding. An integration into the public sector begs the purpose of the school.

The whole identity and ethos is tied up by the fact we are a private religious school.

In similar vein, respondents who concede to integration also expressed an overriding concern about the impact this would have on the ethos of the school and several stressed that integration is an option, provided the school is able to retain its religious basis. For example:

[but] depending entirely on the strings attached

... probably, to provide some kind of education for more people which is urgently required. BUT the whole ethos of the present school would change in this event.

parents in these schools would still be expected to pay for their children's education.

### **5.3.6 Summary**

The above analysis underlines the complex issues surrounding the question of private schools and state funding. Advocates of state aid to private education assert that parents should have a choice in selecting the type of education, because they perform an important education service in providing high quality education and providing some relief to the overburdened public sector. Critics on the other hand, are concerned that private education, in fact, undermines public education and encourages class and racial divisions in society. The question whether private schools should receive state aid is not a simple one to address. The literature study, however, indicates that despite strong opposition against state funding, most countries have some form of direct or indirect funding of private education. Moreover, to draw general conclusions about the consequences of state funding for private schools is difficult. As Shapiro (1986:266-267) suggests, the policy issue of whether to provide state funds to private schools is complex because it is 'less about facts than about values'. Although some private schools are in a position to be completely independent of state funding, there are as many that rely on a state subsidy for their existence. To withdraw state funding places many schools in a delicate position. As Durston (1989:241-242) notes, withdrawal of public funds from private schools is not the way to restore public school confidence. The findings of this research suggest that provision should be made for state aid to private schools in South Africa and that *prior* to any policy decisions being made about the financing of private schools, a thorough investigation be conducted on the consequences of withdrawing funding from private schools (many of which serve the needs of disadvantaged children) or implementing drastic cut-backs to the current subsidy.<sup>44</sup>

## **5.4 THE LEGAL STATUS OF TEACHERS IN PRIVATE SCHOOLS**

In this section several legal facets relating to the employment of teachers in private schools are discussed which constitute an important dimension of private school governance. Firstly, the legal status of teachers in private schools is considered. This is followed by a general discussion on basic legal principles of the appointment, dismissal and discipline of teachers.<sup>45</sup>

### **5.4.1 The private-public law position of teachers in private schools**

The legal status refers to the teachers' legal position in relation to the school. The status of teachers is first and foremost characterised by the private law relationship. In common law, the private sector employment contract is deemed an essentially private law matter. However, it is now accepted that private contracts are no longer purely private and that public law norms and principles are implied in the relationship. In other words, an administrative law relationship exists which is characterised by the unequal relationship of authority between the governing body and teacher. Therefore, it is said that private school teachers have a dual relationship, that is, a private law relationship and a public law relationship, owing to the strong public component of private schools (see section 3.5.2.3 and 5.2.4).

### **5.4.2 Appointment of teachers**

What follows is a brief discussion on some of the general provisions relating to the appointment of teachers. The legal basis for this is found in the school's domestic legislation and general education law.

#### **5.4.2.1 The contractual relationship of employment**

The appointment of teachers vests in the proprietor and/or governing body (table A12). As an autonomous body, the governing body decides on the school's policy on the requirements and procedures for appointment. However, this function is not entirely independent of the education department. The governing body can only appoint persons who are suitably qualified. The requirements for teacher qualifications are laid down by the national education department. In response to a question on whether private schools should be bound by state

regulations in respect of teacher certification, a majority of the respondents (71.6%) said *yes* while only 28.4% answered *no*. Such minimum requirements are considered reasonable to ensure an acceptable standard of teaching. However, this does not preclude private schools from appointing teachers who do not meet the basic requirements laid down by an education department provided the Head of Education is satisfied that the services of the person as an educator are beneficial to the school. This means that while private schools must comply with basic state regulations, they are still in a position to exercise wide discretion over whom they appoint.

A contractual relationship is created when the teacher accepts a letter of appointment. The employment contract defines the legal relationship that exists between the school and teacher. The general principles of contract law apply. Like all legal contracts, it must contain the basic elements of offer and acceptance, competent parties, formal requirements and *bona fide* legal subject matter. Beyond these elements it must contain any other aspects required by education laws and regulations. A contract may be based on an oral agreement or in writing. An explicit written contract is preferable for clarity and legal certainty, and because it is easier to prove if legally challenged. Of the schools surveyed, 89.6% of the respondents required their teachers to sign written contracts while only 10.4% did not have a specific written contract. The nature of the contract may vary from one private school to another in terms of scope and content. Moreover, the content will also depend on whether the employment is permanent, temporary or part-time.

#### 5.4.2.2 Terms and conditions of employment

A contract of employment sets out the rights, responsibilities and conditions of employment. These refer to a wide range of matters concerning a person's employment, for example, remuneration and leave privileges. In private schools, these are generally drafted by the governing body and form part of the school's domestic legislation (table A13). They may, however, vary from one private school to another. For example, not all private schools provide a pension or medical aid. Of the schools surveyed, 92.5% of the respondents included details of the conditions of service while only 7.5% did not. In some cases the letter of appointment, which may be very brief, constitutes the entire contract.

Conditions, rights and responsibilities may be *express* or *implied*. In terms of a teacher's contract, it is not necessary for the parties to agree on every detail because there are basic duties and responsibilities that are well known and universally accepted as part of the teaching profession. For example, it is accepted that teachers will conduct extracurricular activities.

#### 5.4.2.3 Employment rights

While the employment rights of teachers in private schools are mainly derived from contract and common law, additional employment rights accrue from statute. For example, in terms of the Labour Relations Act of 66 1995, which applies to both private and public schools, teachers have the right to freely associate and bargain collectively.

#### 5.4.3 Termination of employment

The powers to terminate a teacher's contract of employment in a private school are vested in the school proprietor and/or governing body. The governing body decides on the grounds for terminating a contract and general procedures<sup>46</sup> (table A14). An employment contract may be terminated for a number of reasons, provided they are legally valid. Terminations can be broadly classified as nonrenewal or dismissal. This distinction is important because of the different legal consequences. In some cases, a teacher's contract, which is set for a given period, is not renewed. Thus at the end of the contract period the employment can be terminated for no specific reasons other than that the contract has come to an end. Generally, the only legal requirement is that adequate notification of nonrenewal is given prior to the expiration of the contract. Employment terminated by means of dismissal attracts more legal requirements. A fundamental requirement is that there must be a justifiable cause for dismissal. In other words, it must be fair and the reasons for dismissal must be legally permissible. Generally, a dismissal is unfair if it is not effected for a valid reason or in accordance with fair procedures. Procedural safeguards are now provided for in the Labour Relations Act 66 of 1995.



#### 5.4.3.1 Disciplinary code and procedures

The governing body of a private school is responsible for formulating the disciplinary code of employees and determining the procedures relating to discipline and dismissal. Although the form and content of disciplinary codes will vary from one private school to another, similarities do occur. In general and in terms of universally accepted employment practices, discipline codes for teachers contain provisions regarding misconduct, procedures to be followed during disciplinary investigations and the nature of disciplinary steps that can be taken against teachers who are found guilty of breaching the disciplinary code.

Misconduct may include the following acts or omissions: insubordination (refusal to follow instructions or carry out legitimate orders); disclosing confidential information; tardiness; incompetent teaching; improper behaviour; the misuse of alcohol and drugs; criminal acts (eg, stealing and child abuse), immoral behaviour, conduct that brings the school into disrepute, misrepresentation (eg, falsifying qualifications), conduct that fails to comply with religious and philosophical beliefs of the school (see section 5.6.4.2) and failure to comply with the school's domestic legislation.

Lawful discipline procedures, which are based on the fundamental principle of reasonableness and fairness, include the following: adequate written notice of the alleged misconduct, a fair hearing, legal representation and the right to appeal. If a person is found guilty of misconduct, one or more of the following disciplinary measures may be instituted. Suspension, with or without remuneration, for a specified period of time, demotion, transfer to another school and dismissal which may be summary or after the required notice is given depending on the circumstances. A person against whom such a measure is taken can appeal against the decision in writing.

While not all disciplinary codes and contracts of employment include details of legal procedures, table 5.2 shows that the majority of respondents do include these procedures in their codes of conduct. However, for legal and managerial purposes, standards of conduct, procedures and consequences should be made clear and be available to employees. Disciplinary records, specifying the nature of disciplinary transgressions, actions taken and the reasons for the actions,

should also be kept. This is essential for creating legal certainty and establishing sound employment practices in schools.

**Table 5.2 Legal procedures (response to questionnaire)**

Legal procedure	Yes	No
Written notification of charge	92.7%	7.3%
Opportunity for a hearing	95.2%	4.8%
Access to evidence	89.1%	10.9%
Hearing before an impartial tribunal	78.8%	21.2%
Legal representation	74.1%	25.9%
Transcripts of the hearing	74.1%	25.9%
Right to appeal against an adverse decision	86.0%	14.0%

#### 5.4.3.2 Rules of natural justice

Because the employment relationship between private schools and teachers is based on private law contract, some argue that the rules of natural justice are not applicable. However, given the nature of the school environment, the dual private-public law relationship that exists between private schools and their employees and the authoritative relationship that exists between employer and employee, the rules of natural justice are considered a fundamental part of the employment relationship (see section 5.4.1).<sup>47</sup>

Since disciplinary actions in a private school constitute a 'quasi-judicial' administrative act, it should, according to the principles of administrative law, be subject to the rules of natural justice.<sup>48</sup> These are essentially aimed at ensuring lawful administrative practices.<sup>49</sup> They should therefore form part of the contractual relationship between the governing body and teacher since it is important for legally sound school governance. If the rules of natural justice are not expressly provided for in a school's conditions of service or disciplinary code (see section 5.4.3.1 and table 5.2), the private school teacher should still be entitled to natural justice when decisions are taken that affect his or her rights, interests and privileges. The fact that action is taken in terms of a contract does

not mean that the principles of common law may be disregarded (Bray 1993:209). However, opinions vary on the application of the rules of natural justice in employment contracts, especially in terms of strictly private contracts.

In the *Embling* case *supra*, for example, the applicant, a teacher employed at a private school, was dismissed for incompetence.<sup>50</sup> He sought an order to be reinstated on grounds that he had been discharged without a proper hearing and was thus not given a formal opportunity to answer the allegations (ie, the rules of natural justice had not been applied) which he claimed were 'vague and unsubstantiated'. The legal issues the court had to address were whether the *audi alteram partem* rule was applicable to a private law relationship and the relevance of the 'legitimate expectation' principle. In terms of the first issue, the court held that the relationship between the teacher and the private school was a purely contractual relationship and there was nothing in the applicant's contract which indicated the inclusion or exclusion of the rules of natural justice. The court further held that the rules of natural justice had no application in the field of contract and that, as the applicant's employment was terminated in accordance with the contract (and Deeds Trust),<sup>51</sup> he was not entitled to a hearing prior to the termination of the agreement, nor were either of the respondents obliged to give the applicant reasons for his dismissal. The basis for the court's reasoning is summed up in the following extract:

The rules of natural justice - succinctly expressed in the maxim *audi alteram partem* - have no application in the field of contract. Contractual rights and obligations are governed by the law of contract. ... As the applicant's employment was terminated in accordance with the terms of the contract he was not entitled to a hearing prior to the termination of the agreement...

The second issue under consideration was the question of legitimate expectation. The applicant contended that:

I have acquired a right, interest or legitimate expectation by virtue of my employment as a teacher at St Andrew's College since 1979 which is such that it would be unfair or unjust for me to be deprived thereof without giving me a fair hearing.

The court also rejected the applicant's claim that the length of his employment had created a *legitimate expectation*<sup>52</sup> and that his contract should therefore not be terminated without a hearing. The court declined to entertain the decision taken in *Lunt (infra)* because, according to the court, the facts and circumstances in this case are neither comparable nor analogous to the case in question. The school's decision to dismiss the teacher was thus upheld by the court.

The *Embling* judgment is thus based on the following premises: first, the employer was *in casu* a private body and therefore not subject to public law and secondly, that even if it were a public body, the contractual right to dismiss on notice absolved the employer of its public law obligations (Grogan 1992:187). This judgment is open to criticism. For example, Grogan (1992:186-195) criticises the judgment for two reasons: first, he considers it incorrect to establish the public or private nature of a corporate entity by merely looking at the contract of employment and then to conclude that the rules of natural justice do not apply. This is supported by Benjamin (1991:350) who states that in the *Embling* case the 'court failed to take into account the evolving nature of the common-law doctrine such as contract' and that 'contemporary social attitudes require that employees should have the benefits of the rules of natural justice when faced with the prospect of dismissal'. Secondly, the mere classification of a body as private is not necessarily sufficient to exclude it from judicial review. Grogan (1992:188-191) notes that the South African courts have reached beyond the contract and have insisted that employers should adhere to the norms of fairness (ie, the common law rules of natural justice) before terminating services in terms of contract and notice, thus public and private bodies are obliged to observe natural justice even though their powers derive from contract, a trend which is also observed in other countries.<sup>53</sup> In the judgment in the appeal against *Zenzile*,<sup>54</sup> Hoexter JA stated that an employer could not hide behind its contractual power in order to evade the rules of natural justice:

The fact that by the law of contract an indisputable right may have accrued to an employer to dismiss his employee does not, for the purposes of administrative law, mean that the requirements of natural justice can have no application in relation to the actual exercise of the right (Grogan 1992:189).

Further cases of note which support this argument are *Lunt v University of Cape Town*<sup>55</sup> and *Administrator, Transvaal and Other v Traub and Others*<sup>56</sup> and *Turner v Jockey Club of South Africa*.<sup>57</sup> In these cases, the courts demonstrated that contractual relationships do not automatically exclude the *audi alteram partem* rule and immunity from judicial review. Of particular importance was the recognition and application of the principle of 'legitimate expectation' (see endnote at 52) which extends the court's powers of judicial review. In *Traub Corbett* CJ stated that the principle of legitimate expectation had evolved 'to make the grounds of interference with the decisions of public authorities which adversely affect individuals co-existence with notions of what is fair in the particular circumstances of the case' (761B-C). While this case deals specifically with a public body, it may equally be applied to private schools, which in any event serve a public interest. Similarly, in the case of *Turner* the fact that the relationship between the jockey and a club is contractual, and the jockey is required to abide by the rules of the contract, does not negate the application of the rules of natural justice. This case is of particular relevance because it was held that even a voluntary association, which is private, or a domestic tribunal, must observe certain fundamental principles of fairness that underlie the system of law (see section 5.2.5).

In the cases referred to, there is wide agreement that due consideration be given to what is *reasonable* and *fair* in the circumstances, irrespective of whether the dispute involves an ostensibly public or private body. Thus, whether the teacher is employed in a state school or private school, prevailing wisdom is that the individual whose rights and interest have been affected and who is placed in prejudicial circumstances by the decision of a higher authority, should be treated fairly. In this regard it is instructive to note the following passage in Grogan (1992:195) in reference to the *Embling* case:

As Goldstone J (as he was then) pointed out in *Mokena & Others v Administrator, Transvaal* [1988 (4) SA 912 (W)], it is patently unfair that an official should be able to take an action with such grave consequences without applying his mind to both sides of the case. It seems no less unfair when a collective body such as the council of a large private school does just that.

In the final analysis the rights of an individual to a fair hearing are cogently summarised by Taitz (1982:271-272). In terms of case law, the following legal principles in the application of the rules of natural justice have emerged:

- (1) Every individual whose rights are prejudicially affected by an administrative act has the right to be heard unless it is clear that the legislature has excluded such right either expressly or by clear intention.
- (2) No person has a right to be heard where the act complained of is of 'purely administrative' nature or is the result of an authority performing a 'purely administrative' function with an unlimited discretion.
- (3) No person has the right to be heard unless the administrative act complained of is of a 'quasi-judicial nature'.
- (4) No person has the right to be heard where the rights he or she seeks to protect are considered by the court to be non-existent.
- (5) No person has the right to be heard where his or her rights are prejudicially affected in the interest of the community as a whole.

In terms of school governance, the dismissal of a teacher is classified as a 'quasi-judicial' administrative act insofar as it affects or prejudices the rights, privileges and interests of the teacher concerned. On this point alone, a teacher would be entitled to natural justice.

#### 5.4.3.3 Constitutional and statutory protections

While developments in case law lend increasing support for the application of the *audi alteram partem* rule in the private law sphere, including private schools, there are other statutory considerations that need to be taken into account. The *Embling* case (1991) also needs to be viewed in terms of the South African bill of rights and in labour relations legislation, for instance. First, the rights of employees to fair practice have been significantly extended by the bill of rights. The rules of natural justice are now embedded in section 24 of the 1993 Constitution, which provides for lawful administrative action (see Appendix C for

provisions in the 1993 and 1996 Constitutions). The extent to which the bill of rights will find application in the private sphere is still one of dispute, but it would appear that in labour disputes where a private school is one of the parties, teachers will be entitled to natural justice. In the second place, private schools now fall under the Labour Relations Act 66 of 1995.<sup>58</sup> Aspects of this Act which are particularly relevant to teachers, in both private and public schools, are the procedural safeguards concerning dismissal and the protection of basic employment rights.

#### **5.4.4 Summary**

This section highlighted basic principles of the legal status of teachers in private schools in respect to the employment contract, termination of employment and discipline. Although there are similarities between private and public schools, there are some differences in terms of the powers and duties of governing bodies. The power to determine policy on the appointment and dismissal of teachers is vested in the governing body, subject to a few regulations by the education departments. However, although the private school teacher's relationship is basically contractual (private law), it is also subject to public law principles.

### **5.5 THE LEGAL STATUS OF STUDENTS IN PRIVATE SCHOOLS**

The previous section dealt with the legal position of teachers in private schools. Specific attention was given to legal issues in appointments, discipline and dismissal which form a crucial part of a school governing body's duties. In this section, the legal position of students in private schools will be discussed in relation to student admission and discipline.

#### **5.5.1 The private-public law status of students in private schools**

The legal status of a student refers to the legal position of the student in his or her relationship with the school (after Bray 1993; see also section 5.4.1). The legal relationship between the student and the private school is a contractual one which is created when the student enrolls at a private school and accepts a place. The contract is, in fact, between the student's *parents* (or legal guardian) and the school governing body. Although contracts can be written or oral, 87.4% of the

respondents required parents to sign an admissions contract. The status and rights of private school students are defined by express and implied terms of the contract.

As in the case of teachers, there is also a public law relationship between students and the school which is based on legislation. In addition to the rules and regulations created by the school's own contract, students are also bound by national and provincial rules and regulations on education, as well as specific legislation that arises out of the particular legal status of the schools. For example, compulsory school requirements, school leaving age, examination requirements, certain curriculum requirements as well as some rules relating to discipline. Thus it can be said that there is a dual relationship which is both private law and public law. This, in turn, has implications for the internal management of students in private schools.

### **5.5.2 Admission requirements and procedures**

Private schools control their own admission policies. In general, admission requirements and procedures are determined by the school governing body (table A15). They set out the requirements and procedures for admitting students to a school, which may vary from one private school to another.

#### **5.5.2.1 Statutory legal requirements**

Although the governing body exercises wide powers in this regard, it does not act entirely independently of the education department. Admission policies of private schools must be in keeping with certain rules and regulations determined by the MEC for education and subject to his or her approval. General provincial legislation requires private schools to register all students and keep a record of all enrolments. Private schools have always had to comply with basic admission requirements (see chapter 2), and providing they are reasonable they should not interfere with the autonomy of the governing body to admit students of their choice. On this issue, most of the respondents (31.3%) felt that current admission requirements did not infringe on their school's autonomy. However, a large number of respondents (26%) remained neutral (table A16).



### 5.5.2.2 Open enrolment and race

The main restriction on admission policies is that schools may not discriminate on grounds of race. All South African schools are now open desegregated institutions. Section 46(3) of the South African Schools Act 84 of 1996 states that a private school may only be registered if the Head of Education is satisfied that 'the admission policy of a school does not discriminate on grounds of race'. This provision applies to both public and private schools and is echoed in provincial education legislation. Since the 1970s, South African private schools have rigorously challenged previous segregationist education legislation on both legal and moral grounds (see chapter 2). Thus for several decades, most private schools have adopted and implemented a non-racial admission policy pursuant of their religious commitment and their basic right as a private school to determine their own policy. Therefore, the new education legislation, which now prohibits admission policies that seek to exclude and discriminate between children on the basis of race, has been welcomed by most schools.

However, there has been some resistance to the new policy of desegregation, mainly amongst Afrikaans schools. One particular issue that has arisen is the question of whether schools, especially private schools and Model C schools (see endnote 23 at chapter 2) who are seeking to convert to private schools, can remain racially exclusive in terms of section 32(c) of the 1993 Constitution, which allows for the establishment and maintenance of private schools based on a common culture and/or religious beliefs. This issue was addressed in *Matukane and Others v Laerskool Potgietersrus*.<sup>59</sup> Although this case does not involve a private school, it is illustrative of the approach that will be taken by the courts regarding admission and race, whether the school is private or public. *In casu*, a number of black students had been refused admission to the school because, according to the school governors, the school was full to capacity and classes were already overcrowded. They also argued that the school was mainly of a Christian Afrikaans culture, which they wished to preserve. The respondents contended that the culture and ethos of the school would be detrimentally affected or destroyed by admitting students from a different culture. The latter defence was based on the argument that the Constitution protects minority rights. To this end, they relied on sections 17, 31 and 32(c) of the Constitution as well as international law, which guarantees the protection of minority groups, to

show that discrimination on grounds of culture, ethnic origin and language was not *per se* unfair or unlawful. The respondents' arguments were rejected by the court, who held that they had failed to show that they had not discriminated against the students and that section 32(c) cannot be interpreted to mean that schools can discriminate against students on the grounds of race. Moreover, even if the school wished to convert to or establish a private school based on their specific language, culture and religious beliefs, they will still not be permitted to discriminate against children on grounds of race. This raises the question of whether a purely private school, that is one which receives no state funding, should, in fact, be prohibited from determining their own admission policy which may include the right to admit students of their own choice. While this may be argued and interpreted from a purely legal perspective in terms of public versus private matters, the legacy of apartheid and the pernicious effect of past racial laws compels the State to intervene in private matters for the purpose of preventing racial discrimination.

Despite the respondents' reference to international law, constitutional and statutory legal principles prohibiting racially discriminatory admission policies in private and public schools have been established internationally. In the USA, for example, following the most oft cited case of *Brown v Board of Education, Topeka*,<sup>60</sup> which declared racially segregated schools unconstitutional, racially discriminatory admission policies are prohibited. In terms of private schools, where the USA Constitution has no application unless there is substantial state-action involved (see section 3.5.3.3), the Civil Rights Act of 1981 prohibits racial discrimination in the making and enforcement of private contracts. This was invoked in the landmark decision in *Runyon v McCrary*,<sup>61</sup> in which the US Supreme Court declared that black students could not be excluded from an all white private school. *In casu*, parents of black children sought to enter into a contractual relationship with private non-religious schools. The students were denied admission because of race. The Court ruled that, while parents have a First Amendment right to send their children to educational institutions that promote their beliefs, it does not follow that the exclusion of students on racial grounds is also protected by the same principle. Of interest is that the Court *did not* extend its decision to religious schools that practised racial exclusion on religious grounds. Thus, in terms of the Constitution, private schools in the US

are not prohibited from being racially segregated. However, religious and non-religious schools that do discriminate on grounds of race face the risk of losing their taxation benefits.<sup>62</sup> Moreover, subsequent judicial decisions have struck down policies of religious schools that racially discriminate.<sup>63</sup>

#### **5.5.2.3 Preferential admission**

Notwithstanding the prohibition to discriminate on grounds of race, private school governing bodies are largely free to select students of their choice and set their own student admission standards. Thus, unlike state schools, private schools may exercise preferential admission in terms of students' intellectual capabilities, gender (eg, single sex schools), culture (eg, language) and religion (this last aspect is discussed more fully in section 5.6.4.1) through a selection process usually involving interviews and admission examinations. However, of the schools surveyed, only 43.6% of the respondents required students to pass an admission examination while 56.4% did not administer admission examinations.<sup>64</sup> Private schools receiving state aid, however, are also prohibited from using language admission tests, which could account for the survey result.

#### **5.5.3 Discipline policy and code of conduct**

School discipline is an important part of the day-to-day management of a school and therefore comes within the principal's duty of internal management. Therefore, it is common practice for the governing body to delegate the task of drawing up the discipline policy to the school principal and staff. This is reflected in table A17 under the category 'other' where most of the respondents indicated that the school principal determined the discipline policy. However, the school governing body still plays a major advisory and adjudication role in setting up the school's discipline policy, determining discipline procedures and ruling on certain discipline decisions such as those concerning the suspension or expulsion of students.

##### **5.5.3.1 Code of conduct**

Private schools are free to determine their own discipline policy and code of conduct for students. These may vary from one school to another but in general they consist of general school rules, sanctions for transgressing school rules and

procedures to be followed for investigating student misconduct. The extent to which the schools surveyed make provision for these legal aspects is shown in table 5.3. From this table it is evident that not all schools give equal attention to various legal components of a discipline policy. However, from a legal and managerial point of view, all schools should have a sufficiently comprehensive policy document that is developed within the context of a sound legal framework, especially in light of the bill of rights. By sound legal framework it is meant that the contents of the policy should incorporate accepted legal principles and procedures, and not conflict with common law and statutory legal principles.

**Table 5.3 Legal aspects relating to a code of conduct (response to questionnaire)**

Aspects included in student code of conduct	Yes	No
Details of all school rules	77.2%	22.8%
Reasons for which students can be suspended or expelled	65.9%	34.1%
Details of disciplinary procedures	52.0%	48.0%
Sanctions for violating school rules	46.3%	53.7%
Procedures of a disciplinary inquiry	34.1%	65.9%
Procedures of disciplinary appeals	31.4%	68.6%

#### 5.5.3.2 Authority to discipline

Traditionally, school administrators' and teachers' authority to discipline students arises from the student-teacher relationship which is based on the principle of *in loco parentis* (in the place of the parent), which holds that teachers have the same rights as parents to discipline and punish children under their care. In terms of this long-established principle, school administrators and teachers exercised wide powers over student discipline. However, in view of the bill of rights, the *in loco parentis* principle has diminished in importance. While the law recognises that discipline is one of the most important functions of school administrators and teachers, it requires that it be exercised in accordance with the principles of fundamental justice.

In the case of private schools, while the governing body and principal are free to determine their own discipline policy, their disciplinary powers are to some extent limited by various national and provincial education regulations. In response to the question on whether the State should be able to prescribe and enforce reasonable disciplinary rules and procedures for private schools, an equal number of respondents agreed and disagreed with the statement (table 5.18), although, overall, more respondents strongly disagreed, which is an indication that private schools wish to preserve their autonomy and be free of too much state regulation in this regard.

#### 5.5.3.3 The special case of corporal punishment

Until recently, corporal punishment was recognised as a legally permissible form of punishment which could be administered under certain strict conditions. In light of the bill of rights, recent South African education legislation dealing with discipline has outlawed corporal punishment which has been applied to both state and private schools. Section 10(1) of the South African Schools Act 84 of 1996 states that 'no person in a school may administer corporal punishment to a learner'. The word 'school' means a public school or an independent (private) school which enrolls learners in one or more grades between grade zero and grade twelve. This provision is echoed in provincial legislation. In other words, private school principals and teachers may not administer corporal punishment.

The issue of corporal punishment under the new legislation has yet to be tested by the courts. In the case of *S v Williams and Others*,<sup>65</sup> the Constitutional Court declared juvenile whipping inhuman and degrading and therefore unconstitutional but did not address the use of corporal punishment in schools. *Obiter*, the Court, however, did indicate that there was no justification for the use of corporal punishment in schools in terms of section 11(2) of the bill of rights which states that 'no person shall be subjected to torture of any kind, whether physical, mental or emotional, nor shall any person be subjected to cruel, inhuman and degrading treatment or punishment'. This section effectively abolishes corporal punishment in schools. Since the bill of rights also effectively applies to private schools (see section 3.5.3.3), private schools and public schools are prohibited from using corporal punishment.

Notwithstanding the emotive issue of corporal punishment and the importance of the human rights debate, the fact that the State is imposing such regulations on private schools may be construed as undue interference in the internal governance of private schools. It is, however, interesting to note that in response to the question on whether State and provincial regulations on corporal punishment should *not* apply to private schools most of the respondents either strongly disagreed (28.5%) or disagreed (27.7%), with only 16.9% strongly agreeing (table A19).<sup>66</sup>

Although corporal punishment has been banned in many countries, such law has not been made applicable to private schools where the autonomy of these schools has been upheld by the courts. For instance, in the USA corporal punishment is still allowed in private schools. Moreover, under the Federal Constitution corporal punishment is still allowed in public schools, although in some states it has been outlawed by the state Constitutions (Levin 1990:67-68). This was upheld in *Ingraham v Wright*,<sup>67</sup> in which the Supreme Court majority stated that the use of corporal punishment does not violate the Eighth Amendment, which prohibits 'cruel and unusual punishment', or the due process clause of the Fourteenth Amendment. Similarly in the UK corporal punishment has been banned in terms of the Education Act of 1980, which brought it into line with European human rights legislation, but private schools are not affected. In the highly controversial UK case of *Costello-Roberts v United Kingdom*,<sup>68</sup> the applicant, a seven-year-old boy who attended an independent preparatory school, claimed that the corporal punishment he received was an assault on his dignity and physical integrity. Ruling in favour of the school, the Court held that the minimum level of severity had not been breached and therefore the punishment did not constitute an infringement on the child's dignity, thereby upholding the school's right to administer corporal punishment. The Court also dismissed the applicant's contention that corporal punishment breached Article 8 of the European Convention on Human Rights (ECHR). It was held that although the concept 'private life' did extend to a person's physical and moral integrity this does not mean that every act that adversely affects a person's integrity constitutes an 'interference' which is prohibited by Article 8. However, in delivering its decision, the Court emphasised that corporal punishment should not necessarily be retained as a means of discipline. Private schools in Australia

are also not prohibited from using corporal punishment although several states have banned it in public schools (Birch 1990:163). Thus, although there is a strong movement to abolish corporal punishment in schools on grounds that it violates basic human rights, the right of private schools to determine their own discipline policies has been respected by the courts and education authorities in many countries. In South Africa, the State's increasing tendency to extend their sphere of influence over private schools, raises serious concerns about the autonomy of private schools and increasing interference by the State.

#### 5.5.3.4 Expulsion and suspension

The authority and discretionary powers to expel and/or suspend students from private schools usually vests in the governing body (or proprietor in the absence of a governing body) (table A20). Students may be expelled or suspended summarily or after a period of investigation depending on the circumstances. The right of private school governors to expel a student in terms of the contract between the school and student and the conditions set out in the Trust Deed was upheld in *P v Board of Governors of St. Michael's Diocesan College, Balgowan*.<sup>69</sup> *In casu*, the Court held that it would not interfere in the decision of the school provided it had been effected in a lawful manner. Therefore, the courts will uphold the right of private schools to establish their own rules governing student conduct, sanctions and procedures to implement the rules. Moreover, they will not generally question the discretion of school governors who administer school rules and procedures as long as they fall within the school contract.

#### 5.5.4 Discipline procedures and the application of the bill of rights

Discipline procedures involve legal procedures which must be followed to ensure that discipline is fair, just and within the law. In private schools, procedures determined by the governing body and school principal are generally only limited by their express and implied contract. Procedures to be followed in the course of an inquiry into misconduct may include the following: proper notice of the offence, a preliminary investigation into the alleged offence and a fair hearing. In some cases, schools have established special disciplinary committees to deal with disciplinary investigations. When determining discipline procedures and

types of punishment private schools are also obliged to take cognisance of the bill of rights which ensures that fair and just procedures are followed.

#### 5.5.4.1 Natural justice

The rights and duties of private school students with respect to discipline are found in the admissions contract, which usually comes with an agreement to accept and observe the school rules. But, although private school students do not have the same statutory rights as students attending state schools, there is a growing trend to grant private school students the right to some minimal procedural safeguards, such as the right to natural justice. In addition to the procedures set out in the contract (the private law aspect), administrative law principles also protect students in terms of their public law relationship. Thus even if schools do not set out these appropriate procedural safeguards in their code of conduct (see table 5.3), students in private schools should still be entitled to natural justice.<sup>70</sup>

The contents and application of the rules of natural justice were dealt with extensively in section 5.4.3.2 in the discussion on teacher employment. In this section the right of students in private schools to natural justice is briefly considered. The rules of natural justice are essentially intended to provide an individual with a fair and proper hearing, and to prevent arbitrary decisions being made which might adversely affect the person concerned. Past cases have established the application of the rules of natural justice in disciplinary disputes involving students at state schools.<sup>71</sup> Whether or not the rules of natural justice should be available to students in private schools, once again brings into question the nature of the relationship between the student and private school. At issue in the case of *Thandroyen v Sister Annuncia*,<sup>72</sup> for instance, was the right of a private school principal to expel a student for misconduct without first giving him a fair hearing. In finding for the principal, Broom JP stated that '... the principles of natural justice, indeed the right to be heard, have no place in the realm of contract'. However, according to Brassy (1993:187), this reasoning, though still employed by the courts, is no longer tenable. Students, whether in private or public schools have a right to a fair hearing. This is now entrenched in section 24 of the Constitution which provides for lawful administrative justice which implies a fair hearing (see Appendix C).



#### 5.5.4.2 Reasonable punishment

In terms of common law, discipline is expected to be fair and reasonable. This standard applies to both criminal law and civil law cases. Punishment is considered reasonable if it fits the offence, is not cruel and excessive, if there is sufficient cause for the punishment, if it is given in good faith and the appropriate form of punishment is used.<sup>73</sup> Section 11 of the bill of rights, which prohibits cruel and unusual punishment, is also interpreted as applying to students in private schools (see section 3.5.2.2 for a discussion on the horizontal application of the bill of rights). However, to date there is no legal authority on this provision in relation to private schools.

#### 5.5.4.3 Right to appeal

The right to appeal against an unfair and unreasonable decision is considered an important aspect of lawful procedure and is implied in section 24 of the bill of rights. This would apply specifically to cases involving permanent and temporary exclusions from schools. Therefore, once a student has been suspended or expelled, a student and his or her parents are entitled to written notice of the reasons for the suspension and expulsion. They should also be given information on their right to appeal, and how to proceed with an appeal. In such cases the school governing body should hold a hearing within a reasonable time and either confirm, revoke or amend the decision. Although this forms an integral part of disciplinary procedures and ought to be included in a school's code of conduct, only a small percentage (31.4%) of the schools that participated in the survey indicated that procedures relating to appeals are included in their policy (see table 5.3).

#### 5.5.5 Summary

In this section the legal status of private school students with regard to admission and discipline has been discussed very briefly in light of constitutional and statutory legal principles. The legal status and rights of private school students are determined by the dual private law and public law relationship that exists between the school and students.

In terms of student admission and discipline, private school administrators enjoy greater autonomy than their public school counterparts. However, owing to the public nature of private schools, the powers and duties of private school administrators are to some extent limited by various national and provincial education legislation. For example, in the case of corporal punishment, which has been outlawed in both private and public schools by the South African Schools Act of 1996 and provincial legislation and which remains a highly controversial issue. While *reasonable* regulations laid down by the State prescribing certain disciplinary procedures for private schools may be considered acceptable, discipline is an area of school management that is best left to school governors and staff. In response to a question on State regulations, the majority of the respondents indicated that the State should not prescribe disciplinary regulations for private schools (table A18).

## **5.6 RELIGIOUS ISSUES IN PRIVATE SCHOOLS**

Religion, which has been a recurring theme throughout this study, has always played a major role in the development and direction of the South African education system. In chapter 3, religion was discussed as one of the most compelling reasons for the establishment of private schools. Moreover, it was pointed out in section 3.5.3.2 that most countries in the world today provide a constitutional or statutory basis for the establishment and protection of private education on grounds of religion.

In this section, the implications of religious freedom for private school governance and management are considered in more detail. The crux of the discussion focuses on the perplexing issue of competing rights of a religious school's inherent and constitutional right to exist as a religious school and to conduct its affairs accordingly, and the right of individuals (eg, teachers and students) to exercise their constitutional right to religious freedom in a private school. A key objective of this section is, therefore, to sketch the legal parameters and principles drawn from a descriptive analysis of international law and various court cases that deal with the aforesaid dilemma.

### **5.6.1 The scope and meaning of 'religious freedom' for the purpose of human rights legislation**

Before discussing the South Africa position with regard to religious freedom in private schools, it is useful to locate the discussion in an international context by examining some of the international legal principles that have evolved over several decades.

Religion forms an important part of human life and, consequently, the right to religious freedom is regarded as one of the most sacred and important freedoms. At an international level, the right to religious freedom has been recognised in a variety of universal documents and domestic bills of rights.<sup>74</sup> Article 18 of The United Nations Declaration on Human Rights, for example, states that:

Everyone has the right to freedom of thought, conscience, and religion; this includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 18 contains two clauses. The first clause guarantees the right to religious freedom and the second clause enumerates the specific rights which are included. This article has formed the basis for subsequent international and domestic legislation.

The International Covenant on Economic, Social and Cultural Rights (1966) for instance refers to religious rights in Article 2(2) which prohibits discrimination of any kind including religious discrimination. Article 13(1) further deals with the need to ensure 'understanding, tolerance and friendship among all ... religious groups' while 13(3) refers to the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.<sup>75</sup>

While these documents are significant, according to Lerner (1996:114), the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief (1981) is presently the most important international instrument regarding religious rights.<sup>76</sup> The document consists of eight articles dealing with various aspects of religious freedom. In particular, Article 1 ensures

that everyone shall have the right to freedom of religion, belief and thought. Article 2 guarantees that no one shall be discriminated against by a State, institution, group or person on religious grounds. With regard to the education and upbringing of children, article 5 provides that parents have the right to determine their children's religious and moral education, provided that such practices are in the best interest of the child and not injurious to his or her physical or mental health, and that every child shall have access to education in the matter of religion or belief in accordance with the parents' wishes. Article 6 consists of a list of freedoms which is by no means exhaustive but nevertheless comprehensive. It recognises the following freedoms: (a) to worship and assemble for religious purposes, (b) to establish charitable institutions, (c) to acquire and use articles related to rites and customs, (d) to write and disseminate relevant publications, (e) to teach religion in suitable places, (f) to receive voluntary financial contributions from individuals and institutions, (g) to appoint religious leaders, (h) to observe religious days and celebrations and establish communications with national and international communities in matters of religion.

Although religious freedom is well covered in international human rights legislation, Lerner (1996:131) notes that such instruments do not define the term 'religion', which is largely to avoid ideological and philosophical definitions that might be controversial. However, Lerner (1996:87) argues that it is indisputable that in United Nations law and modern human rights law, the term 'religion' followed by the word 'belief' means *theistic* convictions involving a transcendental view of the universe and a normative code of behaviour. Furthermore, the term 'belief' should therefore be interpreted strictly in connection with the term religion. It does not refer to beliefs of another character - political, cultural, scientific or economic, all of which are entitled to protection but do not belong to the sphere normally described as religion. The term 'belief' was incorporated to protect non-religious convictions such as atheism (which involves the right not to believe) and agnosticism. Likewise, the term 'conscience' is read and interpreted in connection with 'religion' and 'belief' and is not necessarily capable of a broad meaning other than those based on religious belief. Robilliard (1981:99) states that the grounds of conscience point to and involve belief or conviction based on religion in its broadest sense, as contrasted with personal feelings, however

strongly held, or intellectual creed. The courts have also given some content to the scope and meaning of religious freedom. For example, in the US case of *Borchert v City of Ranger, Texas*,<sup>77</sup> the term 'religion' was held as denoting 'conformity in faith and life to the precepts inculcated in the Bible, respecting conduct of life and dignity toward god and man; the Christian faith in practice'. An earlier court decision provided a wider definition of religion, but also God-specific, in *Minersville School District v Gobilis*<sup>78</sup> in which it stated that:

'Religion' is squaring human life with superhuman life... belief in a superhuman power and an adjustment of human activities in the requirements of that power, such adjustment as may enable the individual believer to exist more happily... . The term religion has reference to one's views of relations to his Creator and to the obligation they impose of reverence for his being and character, and of obedience to his will.

This God-specific definition was extended in the UK case of *R v Registrar General; Ex Parte Segerdal*<sup>79</sup> in which the term 'religious worship' was defined as 'reverence or veneration of God or of a *Supreme Being*' (italics added) (Cotler 1989:173-174). In the USA case of *R v Smith*,<sup>80</sup> the term 'conscience' was interpreted to (Cotler 1989:174):

... provide scope for including as protected certain codes of systems or beliefs which are as fundamentally important and vital to their adherents as the more "orthodox" religions but which do not include the concept of a theistic centre among its cardinal principles of belief.

In essence, it can be said that religious freedom includes freedom of conscience and thought, the right to believe or *not to believe*, to follow religious practices, to observe certain rites and to worship, which encompasses the right to pray and hold prayer meetings. Religious observance also entails the right to fulfil the requirement's of one's religion on special days or during special seasons. It is logical therefore that the right to religious freedom be read with other rights, such as the right to free expression, association and privacy.

### 5.6.2 Religious freedom in education: an international law perspective

The protection of religious freedom in schools has been approached by countries in different ways. In the United States, for example, the First Amendment<sup>81</sup> established a clear distinction between the church and state. According to Abernathy (1972:248), the separation of church and state is based on the premise that religious liberty is best protected when government remains absolutely neutral on matters of religion. The First Amendment contains the establishment clause and freedom clause. It states that 'Congress shall make no law respecting an *establishment of religion*, or prohibiting the *free exercise* thereof, or abridging freedom of speech...' (italics added).<sup>82</sup> Both these clauses have given rise to numerous litigation resulting in conflicting judgments.

According to McCarthy and Cambron-McCabe (1987:26) the USA case of *Everson v Board of Education*,<sup>83</sup> in which the court upheld the constitutionality of the use of public funding to transport students to and from public and church schools, was the first major establishment clause decision. *In casu* it was concluded that the establishment clause means that:

Neither a state nor Federal Government can pass laws which aid one religion, or prefer one religion over another, force or influence anyone to go to church or to stay away, punish anyone for entertaining religious belief or disbelief, or levy tax to support religious activities or institutions. ... Neither a state nor the Federal government can, openly or secretly participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion was intended to erect a wall of separation between church and state.

The court held that the aid provided did not breach the requirement that taxpayers money (ie, public funds) could not be used to support religious institutions since it did not support the church school involved but merely assisted parents to get their children to and from recognised schools.

This separation of church and state has subsequently resulted in a secular system of education in which religious practices in state schools have been outlawed over a number of years.<sup>84</sup> The establishment clause and free exercise

clause prohibits teachers and students from exercising their religious beliefs in such a way as to violate the fundamental rights of others. The relationship between education and religious rights has been the subject of adjudication in a number of cases. The USA Supreme Court has, for example, outlawed religious instruction on public school premises<sup>85</sup> and declared unconstitutional state regulation that required the recitation of prayers and Bible reading in public schools.<sup>86</sup> A daily period of silence in public schools for purposes of voluntary prayers and meditation<sup>87</sup> was in violation of both state and federal constitutions.<sup>88</sup> A court further ruled against a teacher who read the Bible to her class and told Bible stories<sup>89</sup> and in yet another case a teacher was dismissed for trying to recruit students to join her religious organisation.<sup>90</sup> However, it has been decided that release-time for public school students to receive religious instruction off school property was constitutional, provided no state funding was involved.<sup>91</sup>

Private schools, on the other hand, are free to determine their own religious policies. Most contraventions of state regulations by private religious schools have focused primarily on fundamentalist Christian academies and their refusal to comply with state standards rather than the First Amendment (McCarthy & Cambron-McCabe 1987:45). For instance, in the USA case of *State v Whisner*,<sup>92</sup> the Ohio Supreme Court invalidated comprehensive state regulations governing practically all aspects of the educational programme in private schools as interfering with their free exercise of rights. However, a number of cases have arisen that deal with the constitutionality of state aid to private church schools (*Everson supra*). In this regard, the *Lemon v Kurtzman*<sup>93</sup> case is of major jurisprudential significance because of the three-part test for constitutionality laid down by the court (Carpenter 1995:687). The elements of the '*Lemon*' test are as follows: first, the statute must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion and third, the statute must not foster 'an excessive government entanglement with religion'. If a statute or programme fails any of these three tests, it will be declared unconstitutional (Data Research 1987:90).<sup>94</sup>

In contrast to the United States, religious education and practices remain a compulsory part of the semi-private and public school programme in Britain. The Education Act of 1988 lays down that there must be religious education and

collective worship in all schools within the statutory system. Section 6 requires that all students take part in an act of collective worship and section 8 provides for compulsory religious instruction according to an agreed syllabus. It further specifies that religious instruction is in the main Christian whilst taking account of the teaching and practice of the other principal religions practised in Britain. However, while there must be religion in all schools, no child may be taught any doctrines or practices which are contrary to the wishes of his or her parents, even in a *denominational school*. For example, many denominational church schools which fall under the category of voluntary-aided schools, that is schools which are provided by a non-state body and are governed by school governors in accordance with their founding trust deed or customary practice, are also subject to the regulations governing religion in the 1988 Education Act. As a signatory to the European Covenant on Human Rights, UK parents and students enjoy the right to religious freedom. Parents therefore may if they wish withdraw their children wholly or partly from attending religious worship (section 9(3)(a) of Act 1988) and from religious instruction (section 9(3)(b) of Act 1988) or from religious worship and instruction (section 9(3)(c) of Act 1988). Independent schools which fall outside the maintained, public sector and which receive no grants from state funds, are free to determine their own religious policies. However, independent schools are still required to comply with the collective worship provision (personal communication with school principals).

### **5.6.3 Freedom of religion in South African law and education**

In South Africa, religious education and religious practices have always formed an integral part of the formal curriculum. However, education legislation has always recognised parents' rights to withdraw their children from religious education classes and religious practices. This has been given greater legal force with the introduction of the bill of rights. Section 14 of the 1993 Constitution guarantees religious freedom stating that 'every person shall have the right to freedom of conscience, religion, thought, belief and opinion...'. According to section 14(2), '...religious observances may be conducted at *state and state-aided institutions* under rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an *equitable basis* and attendance at them is *free and voluntary*' (italics added). This is supported by provincial education legislation which reiterates religious freedom



and prohibits compulsory attendance. In practice, this means that principals and school governors may not develop school policies that conflict with the bill of rights and that prevent children from exercising their right to religious freedom. It also has far-reaching consequences for schools that are increasingly becoming multi-faith schools. Principals and teachers have an obligation to reflect the multi-faith nature of the school population in its religious practices.

#### **5.6.4 Implications for private school governance**

Although section 14(1) of the 1993 Constitution does not specifically mention private schools, they do not remain unaffected. Until recently, private schools enjoyed much autonomy in determining policies regarding the religious nature and requirements of a school. The school governing body (which includes the principal) is generally responsible for determining the religious ethos, mission and policy of the school in accordance with the tenets and mission of the superior religious body or order under which the school is established. This situation is likely to change with the bill of rights which will undoubtedly influence the way in which religious schools are managed. An important question that is raised is whether the freedom of religion clause will have horizontal as well as vertical application, and if private schools may 'discriminate' on religious grounds in the interest of maintaining the religious ethos and purpose of the school. This is one area which is likely to give rise to an increase in litigation in South Africa.

While private schools may not discriminate in any way on grounds of race (see section 5.5.2.2), there is some legal uncertainty as to whether they can discriminate on religious grounds. According to section 32(a) of the 1993 Constitution 'every person shall have the right to basic education and to equal access to educational institutions'. This, however, is further qualified by section 32(c) which states that 'every person shall have the right to establish, where practicable, educational institutions based on a *common culture, language or religion*, provided that there shall be no discrimination on the ground of race' (italics added). In applying a wide interpretation, it would appear that section 32(c) allows for an explicit departure from the general principle of section 8(2) which holds that no one may be discriminated against on various grounds including religion. This deviation, however, only pertains to religion and culture and not race. Thus, if it is indeed possible for religious private schools to deviate

from the equality principle, how does it work in practice? Two questions that are of interest to this discussion are: (1) Are private religious schools entitled to be selective with regard to the appointment of teachers and registration of students? and (2) Can schools make religious education and worship compulsory? In the absence of South African case law and legal authority on these issues, extensive reference is made to comparable foreign case law with a view to identifying important international legal trends and developments that will no doubt influence South African decisions on similar issues which are pending.

#### 5.6.4.1 Admission of students on religious grounds

On the question of whether particular religious affiliation was a requirement for admission, 96.3% of the respondents said that students do not have to belong to a particular faith while only 3.7% had this as a requirement. Although the majority of respondents indicated an open policy, for some single-faith schools, it is considered to be essential for their teaching and the promotion of their religion that students belong to the same faith. Moreover, situations may arise where a school gives preference to children of a particular faith even if this is not a general policy requirement. The extent to which private schools (and, indeed, public schools) may discriminate on religious grounds is an important issue which warrants some discussion.

Although there is no conclusive evidence emerging from international legislation and foreign case law,<sup>95</sup> examples from foreign case law demonstrate that the selection and admission of students on religious grounds (whether in public or private schools) is not necessarily unlawful and in contradiction with constitutional principles protecting freedom of religion (as yet there is no South African case law dealing with this matter). For instance, in the UK case of *Choudhury v Governors of Bishop Challoner Roman Catholic School*,<sup>96</sup> the House of Lords held that a Roman Catholic school could discriminate in favour of Catholics and refuse to admit non-Catholics or non-Christian children on the basis that the school is already over subscribed. *In casu*, two Asian parents (a Muslim and Hindu) tried unsuccessfully to send their children to a Roman Catholic voluntary-aided secondary school for girls. The court acknowledged that the admission arrangements were the responsibility of the school governors and that they could refuse to admit a child of another denomination on the basis that

such admission would be 'incompatible with the arrangement' contained in the admissions agreement. However, it was further held that the governors' 'admission policy must be reasonable' (Harris 1992:529).

#### 5.6.4.2 Appointment and termination of teachers' contracts on religious grounds

Similarly, the question of whether teachers can be discriminated against on religious grounds is also raised. In the survey conducted, 93.3% of the respondents indicated that teachers do not have to belong to a particular faith to be eligible for employment while only 6.7% had this as a requirement. Once again, although the schools indicated an open, non-discriminatory policy situations do arise where teachers are dismissed for religious reasons. The extent to which the law allows this is also not decisive.

With regard to the appointment of teachers and the termination of their contracts, discrimination on religious grounds does occur. According to Lerner (1996:110), the principles of equality and non-discrimination may be violated on grounds of employment and labour. Religious persons may also be prevented from performing freely their religious duties as a consequence of conditions of work. Sometimes religious convictions may also be a reason for non-eligibility for a job or, on the other hand, membership of a church or religious organisation may create privileges in the access to employment, situations which may or may not be considered illegal according to the circumstances. For example, a religious congregation that wishes to hire an educational officer or teacher for one of its schools may limit its search to members of that congregation.<sup>97</sup> The UK case of *Jones v Lee*<sup>98</sup> may be used to illustrate this position. *In casu* the principal of a Roman Catholic school got divorced and married an assistant teacher at his school who was also a divorcee. The principal was dismissed after a specially appointed tribunal declared that:

... we feel that the position of a head teacher of a Roman Catholic school undertakes ... a leader in a religious community and it is unthinkable that such a person could be permitted to retain his position while blatantly refusing to conform to the teachings of the Roman Catholic faith.

Although the Court of Appeal held that the principal's dismissal was wrong, the decision was not based on the principle of equality or non-discrimination but on an administrative law principle, namely, that the principal had not been given the opportunity to be heard by the school managers before they dismissed him (in other words natural justice) and because the managers had wrongfully delegated their authority to an ecclesiastical tribunal (*ultra vires*). With regard to the wider moral issue, Lord Denning was prepared to give some support to the view that a teacher could be dismissed in circumstances such as these provided the managers followed the correct legal procedures (Robilliard 1981:98).

The Canadian case of *Caldwell v Stuart*,<sup>99</sup> lends further support for schools to discriminate on the basis of religion. *In casu*, a Roman Catholic teacher in a Roman Catholic school was not rehired for the following school year as she had married a divorced man in a civil ceremony contrary to church dogma. The proceedings were brought through a formal complaint under British Columbia's Human Rights Code, alleging dismissal without reasonable cause and discrimination against marital status and religion. A central issue in this case was whether religion may in some instances constitute a *bona fide* occupational qualification. According to McIntyre J:

The essence of the test ... may be phrased in this way. Is the requirement of religious conformance of Catholic teachers, objectively viewed, reasonably necessary to assure the accomplishment of the objective of the Church in operating a Catholic school with its distinctive characteristics for the purpose of providing a Catholic education to its students?

The clear importance of this case is that it recognised that adherence to denominational tenets constitutes a *bona fide* qualification of employment. Other states in Canada, which have separate or denominational schools, also make provision for religion to be used as a condition of employment (MacKay 1984:257). For example, the Ontario Education Act of 1980 allows separate schools to require as a condition of employment that teachers agree to respect the 'philosophy and tradition of the Roman Catholic separate schools in the performance of their duties'. By implication, teachers who fail to do so may be dismissed or refused an appointment. This position was affirmed in the Ontario case *Re Essex Roman Catholic Separate School Board and Porter*,<sup>100</sup> which

according to Dickinson & Mackay (1989:215) presents the strongest affirmation of denominational rights, and in *Re Essex Roman Catholic Separate School Board and Tremblay-Webster*.<sup>101</sup> Both cases involved teachers who were dismissed for allegedly marrying outside the requirements of the Catholic Church. In the *Porter* case, the Ontario Appeals Court upheld the dismissal on the ground that a denominational school board can use religious reasons as *just cause* for dismissal. In part Justice Zuber stated:

I take it to be obvious that, if a school board can dismiss for cause, then in the case of a denomination school cause must include denominational cause. Serious departures from denominational standards by a teacher cannot be isolated from his or her teaching duties since within the denominational school religious instruction, influence and example form an important part of the education process (Dickinson & Mackay 1989:486).

In the UK case *Ahmed v ILEA*<sup>102</sup> a teacher who was a practising Muslim, required an extra 75 minutes after his Friday lunch break to attend the nearest Mosque for prayers. After his colleagues objected that this disrupted work in the school, the Inner London Education Authority, offered him a four and a half day week contract. Ahmed refused and left the school claiming unfair dismissal. On appeal, by a 2-1 majority, the Court held that the dismissal was fair. A later attempt to petition the European Commission on Human Rights to hear the case was also unsuccessful.<sup>103</sup> According to Cumper (1996:230), there is some fear that if such actions do succeed it could lead to widespread disruption in schools and that although the rationale may seem harsh, objectively it is reasonable.

Similarly, the USA case of *Cooper v Eugene School District*<sup>104</sup> is illustrative of the rulings of the majority of USA courts on the issue of religious freedom (Imber & Van Geel 1993:464-467). *In casu*, a special education teacher was suspended and her teaching certificate revoked by the district superintendent because she refused to discontinue wearing a Sikh turban and white robe while teaching her sixth and eighth grade classes. The order was challenged on constitutional grounds in the Court of Appeals which set aside the revocation of the teaching certificate as an excessive sanction under the court's interpretation of the First Amendment doctrine. The school district and superintendent appealed against the decision in the Oregon Supreme Court who reversed the decision of the

Appeals Court. Although the school's action had infringed upon the teacher's First Amendment right it was not considered excessive in that it helped maintain religious freedom in schools. The decision in *Cooper* does not authorise the firing of a teacher for wearing religious clothing per se, but rather when it is considered that the repeated display of religious clothing and symbols conveys the message that the school approves and endorses that particular religion (Imber & Van Geel 1993:464-467; Guthrie & Reed 1991:153).<sup>105</sup>

Although there is no clear or conclusive message emerging from the courts on the issue of denominational rights, the above cases serve to illustrate that in some instances the courts will allow school governors to appoint and dismiss teachers on religious grounds provided it is reasonable and lawful. The opposing views on this issue reflect the conflict between denominational rights of the school and teachers' human rights vis-à-vis equality rights and religious freedom.

#### 5.6.4.3 Religious education and worship in private schools

The question of compulsory religious education and worship in private schools is more complicated. While religious schools do not necessarily require teachers and students to belong to a specific faith to be accepted at the school, it is generally assumed that the teachers and students will participate in the religious activities of the schools as this ultimately forms the foundation of the whole educational process in a religious school. While this is not always explicitly provided in a school's domestic legislation, it is implied from the religious nature of the school and custom, and the fact that religious instruction and worship lie at the very heart of a religious private school's existence. In general, the *raison d'être* for religious private schools is to be able to establish an education environment and pedagogy based on the ideology, tenets and practices of a specific religion. It is also generally accepted that parents who *choose* to send their children to a private school which has a specific religion, recognise and accept the school's religious policy. This does not mean to say that they may not be of a different religion or are prohibited from practising that religion.

However, although section 14(2) does not mention private schools, provincial education legislation dealing with religious policies does impose some restrictions on private schools. To illustrate this, reference is made to the Gauteng School

Education Act of 1995.<sup>106</sup> According to section 22(3)(a)(i) 'every learner at a private school which receives a subsidy ... shall have the right not to attend religious education classes and religious practices at school.' Therefore, teachers and students can evoke section 14(1) of the bill of rights and relevant provision in provincial legislation such as section 22(3)(a) of the Gauteng School Education Act to challenge the status quo in religious schools and to seek to exercise their religious rights by refusing to participate in religious activities. This is naturally a contentious issue considering the majority of private schools receive a state subsidy. The survey response to the statement that every student at a private school should receive a state subsidy should be exempted from religious education and religious practices drew a clear negative response: 52.7% of the respondents strongly disagreed and 25.2% disagreed while only 3.8% strongly agreed (table A21).

A growing concern with such provisions and the trend to challenge the status quo is the effect it will have on the essence of the school's religious ethos, values and mission. At the time of writing, there were already a number of cases pending. In one instance, a teacher had been dismissed from a private school for refusing to participate in religious activities and in another school, the parents of a student attending a Catholic school were refusing to allow their child to attend or participate in religious activities on account of her being a Jehovah's Witness, in spite of the fact that the child had happily been participating fully in the school's religious programme for over two years.<sup>107</sup> Both these cases have since been settled out of court. In an early much publicised case, a student was expelled from the private Deutsche Schule in Pretoria for refusing to attend religious education classes. The parents believed that the Lutheran based education would be harmful to their child and contended that compulsory religious classes were an infringement on their child's constitutional right to freedom of religion. If an increasing number of teachers and students seek to exercise their rights through the courts, there is concern that the overzealous efforts to promote and protect an individual's right to religious freedom can eventually lead to the erosion of a school's fundamental right to exist as a religious school. Moreover, attempts by the State to influence the religious activities of private schools by imposing certain restrictions, may well result in the imposition of values and practices that private schools wished to avoid in the first place.

One approach to this problem is to consider the scope and limitation of the right to religious freedom *within the school context*. The crux of the matter is whether the right can be limited and, whether the collective right of the school which is joined by a common religious purpose is less or more persuasive than the right of the individual, which includes the right *not to choose* to attend that particular private schools. Freedom of religion is a relative not an absolute right. As with most human rights, the right to manifest one's faith usually has to be weighed against other factors such as social harmony (Cumper 1996:227). Thus international human rights instruments permit signatories to impose legal limitations upon the manifestation of religion to the extent that these are required for public order, health or morals, or for the protection of the rights and freedom of others.<sup>108</sup> Numerous examples of the limitation placed on religious freedom and expression can be found in case law.<sup>109</sup>

In terms of education and religious freedom, provision is also made for the limitation of rights. For example, in South Africa, the Gauteng School Education Act 6 of 1995, section 22(3)(b) states that 'the right conferred by section (a) on a learner at a private school which receives a subsidy... may be limited where such limitation is necessary to *preserve the religious character* of the private school concerned (italics added)'. Within the school context due consideration must be given to the religious *raison d'être* of the school, the founding statement and customary practice. In other words, the school's right to exist and practice as a religious school must be weighed against the right of the individual, and whether limitations can be placed on the individual in order to maintain the overriding religious and moral ethos of the school.

#### 5.6.4.4 Summary

This section dealt with the legal position of private religious schools with respect to religious freedom, and the implications for school governance in terms of student admissions, the hiring and firing of teachers on the basis of religion, and compulsory participation in religious activities and compliance with the religious policy of the school. The critical issue under discussion concerns the rights of private religious schools to conduct their affairs in a manner that is in keeping with their religious doctrines and tenets, the right to preserve their special religious ethos and character and the right to protect their autonomy as a



religious school. The constitutional battles that are bound to emerge from this situation are likely to focus on two competing constitutional principles. The first contained in section 14 of the Constitution guarantees the right to freedom of religion, belief, thought and conscience. The second is found in section 32(c) of the Constitution which provides for the establishment of schools on the basis of common culture and religion.

While none of the issues discussed in this section have been finally resolved (or are likely to be), it is nevertheless possible to draw some conclusions from international trends and the few cases cited. First, it is apparent that dismissal for denominational cause is recognised by the law and that the requirement of religious conformance is considered reasonably necessary to assure the objectives of a religious school. Employment contracts may therefore incorporate regulations and policies that require teachers to observe religious standards and teachings of the sponsoring church, and to make it a condition of employment and contract renewal to uphold the religious values of the school. Secondly, it appears that religious private schools do have the right to insist that teachers and students comply with the religious policy of the school and to make compulsory participation in religious activities a condition for admission and employment. Thirdly, while some religious discrimination in employment might be tolerated, schools need to show that it is in the interests of preserving the religious philosophy and values of the school. Fourthly, while the State has an important role to play in protecting the religious rights and freedoms of individuals, it will not necessarily interfere with the decisions of the school unless it is substantially shown that intervention is necessary to protect the teacher or student. Finally, it can be said that these general observations may serve as guidelines or arguments for consideration by the South African courts when such cases appear before them. However, ultimately the courts will be required to adjudicate each case in terms of the South African bill of rights and the underlying values and principles of the Constitution.

## **5.7 SUMMARY**

This chapter has examined the general *legal position* relating to (1) the legal status of private schools and private school governance, (2) the controversial issue of providing private schools with public funding, (3) the appointment and

discipline of private school teachers, (4) the admission and discipline of private school students and (5) the sensitive issue of religious freedom in private schools. Each of the aspects dealt with are complex and will require further research as new education legislation and regulations evolve and the new 1996 Constitution is implemented. However, notwithstanding the limitations of this chapter, a range of legal issues emerged which are important for education policy makers and school administrators who are ultimately responsible for the development and implementation of domestic legislation needed to govern and manage schools, whether private or public. With regard to private schools, it is evident that although they are independently owned and enjoy greater autonomy than public schools in terms of the development and implementation of domestic legislation and general school governance, they are not free from state control or intervention. Throughout the discussion on the key policy issues, that is governance, funding, teacher appointments and discipline, student registration and discipline and religious issues, the areas and level of state regulation of private school matters were highlighted. While both the state and private school sector have legitimate interests in education, a major challenge to private schools is to assert their constitutional right to exist and to maintain their autonomy over their internal affairs, while simultaneously working to establish a sound partnership with the State in the pursuit of providing quality education for diverse educational needs within the spirit and context of the new democratic constitutional dispensation.

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#### ENDNOTES

- <sup>1</sup> The establishment of a trust and the appointment, powers, duties and capacities of trustees are contained in the Trust Property Act 57 of 1988.
- <sup>2</sup> For a discussion on the types of companies and their legal status consult *Corporate law* by Cilliers and Bernade (1987).
- <sup>3</sup> See for example: section 60 of the Northern Province School Education Act 9 of 1995; section 66 of the Gauteng School Education Act 6 of 1995, section 63 of the Mpumalanga School Education Act 8 of 1995. In each of these Acts the regulations on the registrations of private schools are similar.

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- <sup>4</sup> Memoranda and articles of association set out fundamental provisions relating to the organisation and management of an organisation and must be registered with the registrar of companies. The memorandum defines the nature of the company, its objectives and the liability of members. Articles of association, which are subordinate to the memorandum, generally describe how the internal affairs of a company are to be regulated and administered. The articles also usually define the legal position and functions of members (Beuthin & Luiz 1992).
- <sup>5</sup> All state schools are now to have a school governing body as part of the process of standardisation and democratisation.
- <sup>6</sup> Sections 13 - 17 of the South African Schools Bill of 1996 contained fundamental legal rules which dictated the size, appointment, composition and the powers and duties of governing bodies, as well as the powers of the Member of the Executive Council (MEC) regarding governing bodies, composition of governing bodies in public schools and the election of members respectively. With regard to private schools, section 38(1)(d) of the Schools Bill of 1996 stated that 'The Member of the Executive Council shall, by notice in the Provincial Gazette, determine requirements for the democratic governance of a registered independent school'. If these provisions were indiscriminately applied to private schools, it would have had considerable effect on how private schools are governed. The Independent Schools' Council recommended that section 38(1)(d) be removed from the Bill lest the requirements for the governance of state schools that are set out in sections 13, 14, 15, 16 and 17 be merely adopted for the governance of private schools. Several of these provisions would place a severe limitation on the autonomy of private schools to establish their own policy regarding school governing bodies. For instance, section 16(1)(c) 'the composition of a *governing body* at a *public school* shall include *members of staff* at the school who are not educators' and 16(1)(e) 'the composition of a *governing body* at a *pubic school* shall include in the case of a secondary school, *learners* at the school nominated by the students' representative council of the school'. Section 38(1)(d) was subsequently omitted from the School Act of 1996 and the aforementioned provisions were not made applicable to private schools.
- <sup>7</sup> The law recognises two categories of legal subjects, namely natural persons (human beings) and juristic persons, such as a group or association of people, for example, a church, university or school.

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<sup>8</sup> This section confines itself to a discussion on liability concerning the school as a juristic person and its principal agent the governing body. Teacher, student and parent liability is therefore not dealt with in this thesis but is of immense importance and a subject that requires further research.

<sup>9</sup> With regard to public schools, section 60(1) of the South African Schools Act of 1996 states that 'the State is liable for any damages or loss caused as a result of any act or omission in connection with any education activity conducted by a public school and for which the public school would have been liable but for the provisions of this section'.

<sup>10</sup> Criminal liability for corporations and their servants is dealt with in section 332 of the Criminal Procedure Act 51 of 1977. Section 332(1) expressly provides for the criminal liability of a corporate body itself and section 332(5) provides for the personal liability of servants of corporate bodies.

<sup>11</sup> At the 23rd General Meeting of the HMC the relationship between the governing bodies and principals of private schools was discussed. The following is a summary of some of the points made that are still valid today (HMC 1969:22-23):

The Governing body:

- (a) Frames the general policy, educational and financial, of the school, in consultation with the principal.
- (b) Controls the finances of the school and decides the fee and the scale of salaries and wages of the staff.
- (c) Appoints the principal.
- (d) May terminate the appointment of the principal. Summary dismissal should be possible only in cases of conduct recognised by the law as amounting to breach of contract, such as serious incompetence and misconduct.
- (e) Informs the principal, before the appointment, of the Constitution of the school and enters into a contract with the principal.
- (f) In certain church schools, the Visitor, or the equivalent, has certain responsibilities laid down by the Constitution, such as the appointment and dismissal of the principal.

The principal:

- (a) Is responsible to the governing body for the management of the school. Before action is taken in any matter of unusual importance, including expulsion of students or dismissal of staff, the principal will consult with the governing body except where the matter is of such urgency as to demand immediate action.

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- (b) Appoints, dismisses and controls, as agent for the governing body, all members of staff and employees.
  - (c) Admits all pupils.
  - (d) The principal is responsible to the governing body for the entire internal economy and discipline of the school, as well as for the conduct of its academic and corporate life.

<sup>12</sup> 1991 (4) SA 458 (ECD). This case deals with the termination of a teacher's employment contract.

<sup>13</sup> For example: *Lunt v University of Cape Town* 1989 (2) SA 438 (CPD); *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W); *Marlin v Durban Turf Club* 1942 AD 112 and *Theron v Ring van Wellington van die NG Sendingkerk in Suid-Afrika* 1976 (2) SA 1 (A).

<sup>14</sup> The term 'administrative' is the same as 'function' but is the preferred term because 'function' is open to different interpretation (Wiechers 1985). In education management, the term 'management functions or tasks' is generally used which encompasses a vast range of activities performed by school governors and managers. For the purpose of this discussion, these managerial activities are classified according to the three types of administrative acts which essentially defines their legal status.

<sup>15</sup> For a thorough discussion on the requirements for valid administrative acts in general consult Wiechers (1985) and in the school context consult Bray (1988).

<sup>16</sup> Regulations concerning exemption from property taxes can be found in the following Ordinances: Cape Ordinance 20 of 1974, Orange Free State Ordinance 8 of 1962, Transvaal Ordinance 11 of 1977 and Natal Ordinance 25 of 1974.

<sup>17</sup> See section 48(1)(c) of the South African Schools Act 84 of 1996.

<sup>18</sup> See for example: section 66 of the Mpumalanga School Education Act 8 of 1995, section 63 of the Northern Province School Education Act 9 of 1995 and section 69 of the Gauteng School Education Act 6 of 1995.

<sup>19</sup> See for example: section 46(3)-(6) of the Mpumalanga School Education Act 8 of 1995, section 43(3)-(6) of the Northern Province School Education Act 9 of 1995 and section 49(3)-(6) of the Gauteng School Education Act 6 of 1995.

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- <sup>20</sup> According to provincial legislation, profit-making private schools will not receive a state subsidy.
- <sup>21</sup> In terms of section 39 of the South African Schools Act 84 of 1996 public schools may charge school fees provided a resolution to do so is adopted by a majority of parents and that equitable criteria and procedures are determined for the total, partial or conditional exemption of parents who are unable to pay school fees.
- <sup>22</sup> 500 S.W 3d 721 (1973)
- <sup>23</sup> 103 S. Ct. 3062 (1983)
- <sup>24</sup> By way of comparison, a survey conducted by the Independent Schools' Information Service (ISIS) in England showed that the existence of independent school saves the State one billion pounds a year (Woodhead 1992:42).
- <sup>25</sup> This observation is based on personal communication with principals of private schools and the researcher's own teaching experience in both private and public schools. The private school at which the researcher taught served a wide range of students drawing on areas which included Houghton, Parktown, Tembisa and Soweto.
- <sup>26</sup> 1996 (3) SA 165 (CC). For a critique of this case consult Malherbe (1996) who argues that a proper contextual approach to the issue could have led to the conclusion that section 32(c) provides for public education based on a common culture, language or religion.
- <sup>27</sup> Whether or not legislation that provides for the establishment and protection of private schools, ie the right to private education, concomitantly places a duty on states to fund private education is a matter of contention to which various countries have responded differently (eg, compare Italy, France and Denmark). In *Verein Gemeinsam Lernen v Austria* (20 EHRR, Commission Supplement No 2, 1995), the applicant, a non-religious private school, challenged the way in which state subsidies are allocated to private schools and the discrimination against non-religious private schools. *In casu*, the Administrative Court held that article 2 of Protocol 1 to the European Convention of Human Rights, which safeguards respect for the religious and philosophical convictions of parents, does not give rise to an obligation to subsidise any particular education but that in terms of article 14, which safeguards individuals or groups from all discrimination in the enjoyment of their rights and freedoms, subsidies should not be

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made in a discriminatory fashion. However, *in casu*, the court argued that church schools are so widespread that if the educational services which they provided were not subsidised by the State, there would be a considerable burden on the State as it would have to make up the shortfall in schools. The applicant association also failed to show that similar schools to theirs received a subsidy and that there was a 'need' for such a school. Likewise, in the *Belgian Linguistic Case* (Series A, No 6, 23 July 1968) the European Commission (who is charged with the task of determining whether a case is admissible prior to it being referred to the European Court) decided that the right to education did not place a positive obligation on the State and did not bind the State to subsidise private education. *In casu*, the European Court also held that Belgium's refusal to establish, subsidise, or maintain primary and secondary education in the Dutch-speaking region was not a violation of article 2 of the First Protocol.

- <sup>28</sup> James (1991) provides detailed empirical data on the nature and extent of private school funding in 35 countries. According to this research, examples of countries which receive more than 75% subsidy are France, Spain, Denmark, Belgium, Germany, Ireland and Singapore; countries which receive less than 25% state subsidy include Kenya, Pakistan and Japan and countries which receive very little subsidy include USA, Italy, Greece, Pakistan and Zambia.
- <sup>29</sup> All *Länder* (ie, provinces) have their own written constitutions which is legally binding on all state legislation in that *Länder*.
- <sup>30</sup> While there is no constitutional right to education in the United Kingdom, this right now exists under European Law.
- <sup>31</sup> The Education Act of 1988 has made other forms of private education available with substantial state funding. For example, the City Technical College scheme whereby colleges (providing primary and secondary education) have been established in inner city areas. These colleges are private institutions but funded by central government.
- <sup>32</sup> For a concise discussion on the private-public funding policies in Australia under the Hawke Labour Government see Smart (1987).
- <sup>33</sup> USA case law yields numerous cases dealing with constitutionality of public aid to private schools. See endnote 94.

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- <sup>34</sup> *California Teachers Association v Riles* 632 2d 953, 962 (Cal. 1981)
- <sup>35</sup> See endnote 94 and section 5.6.2.
- <sup>36</sup> See further Magsino (1986) for a summary on financial support to private schools in various provinces of Canada. In this article Magsino argues that the discriminatory presumptions underlying government policy on funding of private schools need to be reversed.
- <sup>37</sup> Public funding for Roman Catholic separate schools up to grade eight has been provided for since 1871. In 1984 public funding was extended to high schools.
- <sup>38</sup> (1994) C2914, C2975 Ont. Ca
- <sup>39</sup> The voucher system was first suggested by an American economist Milton Friedman. His 1959 essay, 'The role of government in education', introduced the tuition voucher as an alternative to traditional methods of public funding (Kurz 1996:1).
- <sup>40</sup> In the USA, voucher programmes have raised several constitutional problems since they would provide public aid to religious schools. In a recent action attempting to force the State of Wisconsin to expand its non-sectarian voucher programme in Milwaukee to include religious schools, a federal district court held that such an expansion would violate the Establishment Clause. The State expanded the programme despite this decision, and in a subsequent state court challenge, the Wisconsin Supreme Court failed to provide a majority ruling regarding the constitutionality of providing public vouchers for private sectarian schools. The case was returned to the state trial court for further proceedings (see *The Case against school vouchers*, 1996 and Kurz, *Can vouchers save our educational system?*). See also Kutner, Sherman & Williams (1986) for a discussion on tuition tax credits and vouchers, and the possible impact on educational choice in Australia.
- <sup>41</sup> This particular school was established in 1877 and currently receives a 45% subsidy but it is not dependent on state support.
- <sup>42</sup> This school receives a 45% subsidy but its existence is not dependent on state support.



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- <sup>43</sup> In the 1970s, Roman Catholic schools in New Zealand faced a similar challenge. According to Cardinal Williams of Wellington, New Zealand, Catholic schools were forced to become integrated with public schools. This was made possible with the passing of the Private Schools Conditional Integration Act 129 of 1975. However, prior to its acceptance, the Catholic Church stipulated that the religious or philosophical character of the schools should not be disturbed. Moreover, once schools became part of the state system, the Church would retain ownership of buildings. Cardinal Williams stated that integration had not affected the quality of Catholic schools (Graham 1996:4). According to section 3(1), 'An integrated school shall on integration continue to have the right to reflect through its teaching and conduct the education with special character provided by it', and 3(2) states that 'Integration shall not jeopardise the special character of an integrated school'.
- <sup>44</sup> See for example Bauer (1996) for a comment on the role of Catholic schools.
- <sup>45</sup> Although non-teaching staff also constitutes an important part of private school governance, their legal position is not dealt with in this study.
- <sup>46</sup> The rules and regulations relating to the termination of a teacher's contract of employment in a state school are laid down by statute. See for example: section 8 of the Educators' Employment Act of 1993.
- <sup>47</sup> For examples of the content and application of the rules of natural justice in the context of public school employment see *Swart and Others v Minister of Education and Culture, House of Representatives and Another* 1986 (3) SA 331 (C); *Van Coller v Administrator Transvaal* 1960 (1) SA 639 (N) and *Ngubane v Minister of Education and Culture, Ulundi and Another* 1983 (3) SA 160 (D).
- <sup>48</sup> A quasi-judicial act is an act which resembles a judicial act but it is not a judicial act because the body performing the act is not a judicial organ. For a discussion on the varying viewpoints on the validity of the use of the term see Wiechers (1985). In principle, the courts have held that quasi-judicial acts attract the rules of natural justice.
- <sup>49</sup> The contents of the rules of natural justice consist of the following: the *audi alteram partem* rule which in practice means that the person must be given an opportunity to put his side of the case; the right to a fair and impartial hearing; information must be communicated to the party in order to allow him to prepare his case and reasons for

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the decision. The rules of natural justice are now embodied in section 24 of the 1993 Constitution, which provides for administrative justice.

<sup>50</sup> The facts of this case are as follows: the applicant was employed by a private school as a mathematics teacher. When the applicant had returned from six month's long leave he was summoned by the principal (the first respondent) and informed that there had been several complaints about his teaching. Two days later the applicant received a letter of dismissal. The letter summarised the meetings which had been held over the years between the teacher and the principal which reflected the teacher's shortcomings as a teacher, his poor relations with his colleagues and his uncompromising response to legitimate criticism and reasonable requests. The applicant sought and was granted a hearing before a subcommittee of the school council (the second respondent) as he felt he had not been given an opportunity to answer the allegation put before him. The subcommittee reported back to the school council and confirmed the decision taken by the principal.

<sup>51</sup> Clause 27 of the Trust Deed reads that: 'The Principal shall have the power of dismissing any Vice-Principal, Lecturer or Assistant Master, provided that all notices of dismissal be reported without delay to the [School] Council, and that the concurrence of a majority of the Council be necessary to the validity of such dismissal.

<sup>52</sup> This phrase 'legitimate expectation' is reputed to have been first used by Lord Denning MR in the English case of *Schmidt and Another v Secretary of State for Home Affairs* (1969) 1 ALL ER 904 (CA). The concept evolved in England to extend the scope of the application of the rules of natural justice. In essence it means that in certain situations a person may have a legitimate expectation that a decision by an authority will be favourable, or at least that before an adverse decision is taken he will be given a fair hearing (Hlophe 1987:165-166). The concept has been adopted by South African courts in *Everett v Minister of the Interior* 1981 (2) SA 453 (C) and also applied in *Lunt supra* at 13. The doctrine was welcomed as a means of achieving natural justice while avoiding the limitations that had come to be placed on the *audi alteram partem* principle, namely that administrative decisions to which the rules of natural justice apply violate existing rights (Van der Heever 1991:203-208).

<sup>53</sup> For example: in the United Kingdom protection has been extended to common-law employees. A Scottish teacher was entitled to a hearing before being dismissed.

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- <sup>54</sup> *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (AD). In this case the respondents were hospital workers who had been *summarily dismissed* for taking part in a work stoppage and refusing to return to work. They sought a court order to set aside their dismissal on grounds that the employer failed to grant them a fair hearing prior to dismissal. On appeal, the applicants averred that the matter was beyond the reach of administrative law and that the contractual relationship was simply one of master and servant governed exclusively by common law of contract which in practice meant that the employer was entitled to summarily dismiss them.
- <sup>55</sup> *Lunt supra* at 13. *In casu* a post-graduate student was refused readmission on grounds that he had not made appropriate academic progress. The applicant approached the court to overturn the decision on grounds that he had not been given a fair hearing. The respondent relied on the fact that the relationship between the student and the university was based on contract and that the latter had absolute discretion to refuse admission, that there was no obligation to provide the student a hearing and that the *audi alteram partem* rule did not apply.
- <sup>56</sup> 1989 (4) SA 731 (AD). The facts of the *Traub* case are as follows: the respondents, all medical doctors, had applied to be appointed or reappointed to the position of senior house officer at Baragwanath Hospital. Their application were rejected because they had all signed a letter in a medical journal which severely criticised the Provincial Administration for its attitude towards the conditions in the hospital. The respondents succeeded in having the decision set aside on the grounds that they were not afforded a fair hearing. On appeal, the applicants claimed that the respondents, *inter alia*, were not entitled to a hearing.
- <sup>57</sup> 1974 (3) SA 633 (A). In the *Turner* case a jockey was suspended for allegedly bribing another jockey to throw a race. The jockey appealed on the grounds that he had not been given a fair hearing. The Appeal Court ruled in favour of the jockey.
- <sup>58</sup> Previously private schools were not subject to the Education Labour Relations Act 147 of 1993. The new Labour Relations Act 66 of 1995 came into operation on 11 November 1996.
- <sup>59</sup> 1996 (3) SA 223 (TPD)
- <sup>60</sup> 349 US 294, 300 (1955). In this landmark decision the Court rejected the 'separate but equal' doctrine, declaring that segregated public schools are 'inherently unequal'.

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<sup>61</sup> 96 S.Ct 2568 (1976)

<sup>62</sup> For a critical analysis on the issue of tax exemptions for racially discriminatory religious schools see Laycock (1981). Laycock discusses the conflict between two competing rights vis-à-vis the right to racial equality and the right to free exercise of religion. Laycock concludes that both rights are equally important but that it is necessary to determine the appropriate scope of each right and that each should dominate in its own sphere. Thus, the internal affairs of churches are an enclave where the free exercise clause must control while outside such enclaves, the policy against racial discrimination must prevail (ie, Laycock draws a line between the private and public spheres of control). Furthermore, churches should be free to conduct and manage internal affairs autonomously and that pervasively religious private schools, which are well within the religious sphere, should generally be allowed to discriminate racially without forfeiting their tax exemptions.

<sup>63</sup> Other cases of note include: *Brown v Dade Christian School, Inc.* 556 F.2d 310 (1977) in which the court struck down the school's segregation policy; *Horwood v Harrison* 413 US 455 (1973), which allows discriminatory private schools to exist, but they may not receive assistance, such as textbooks, from the state government; *Gilmore v City of Montgomery* 417 US 556 (1974) in which the Supreme Court held that private segregated schools in Montgomery, Alabama were not allowed to use the municipal stadium or other facilities for athletic events and *Bob Jones University v United State* 461 US 574 (1983) in which the Supreme Court held that the Internal Revenue Service (IRS) could deny tax-exempt status to schools, including religious schools, that discriminate on the basis of race.

<sup>64</sup> State schools are now prohibited from using admission tests to select children for admission purposes. This was addressed in *In re: The School Education Bill (Gauteng)* 1996 (4) BCLR 537 (CC).

<sup>65</sup> 1995 (3) SA 632 (CC). Although this case dealt with the constitutionality of juvenile whipping as a form of punishment in terms of section 294 of the Criminal Procedure Act 51 of 1977, reference was made to the practice of corporal punishment in schools.

<sup>66</sup> The fact that this question was phrased in the negative was confusing. However, it would appear that private schools in general are in favour of abolishing corporal punishment and have done so for many years.

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<sup>67</sup> 430 US 651 (1977)

<sup>68</sup> (1982) 4 EHRR 293 (European Court of Human Rights). This case has generated a great deal of debate. See for example J Naldi, *Corporal punishment in schools as an issue of human rights*.

<sup>69</sup> 1961 (4) SA 440 (N)

<sup>70</sup> By comparison, it is interesting to note that students attending private schools in the USA cannot evoke federal due process. The Fourteenth Amendment due process clause, which prohibits States from depriving citizens from life, liberty and property without due process of law, does not apply to private schools. Since it protects personal liberties against State interference, private institutions, including private schools, may not be subject to these restrictions. In order for private school policies and practices to be challenged successfully under this amendment, there must be sufficient 'government involvement in the private school to constitute 'state action' (see also section 3.5.3.3(c)).

<sup>71</sup> For example: *Dhlamini v Minister of Education and Training and Others* 1984 (3) SA 255 (NPD) (a student suspended for allegedly cheating in the examinations was entitled to the rules of natural justice); *Van Wyk No and Another v Van der Merwe* 1957 (1) 181 (AD) (the principal was held to have acted *ultra vires* for failing to apply the *audi alteram partem* principle when he expelled a student).

<sup>72</sup> 1959 (4) SA 632 (N)

<sup>73</sup> See for example *R v Muller* 1948 (4) SA 848 (O) and *S v Lekgathe* 1982 (3) SA 104 (BT).

<sup>74</sup> See endnote 10 at chapter 3.

<sup>75</sup> The Committee on Economic, Social and Cultural rights has raised some issues concerning religious freedom and education in terms of this document. For instance, in terms of article 13, information was sought from States Parties on church controlled schools and the admission of children of different religions or beliefs. It also asked certain States Parties if state law ensured the rights of parents to have their children taught in conformity with their own convictions and whether religious instruction was optional (Tahiz 1996:409-414).

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- <sup>76</sup> Proclaimed by the General Assembly of the United Nations by resolution 36/55 of 25 November 1981.
- <sup>77</sup> 42 F. Supp. 577 (1941)
- <sup>78</sup> 1085 2d 683 (1939)
- <sup>79</sup> (1970) 2 Q.B. 697 (C.A)
- <sup>80</sup> 25 Atla. L.R. (2d) 238 (1983)
- <sup>81</sup> The First Amendment of the US Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' This article guarantees freedom of religion but it does not imply that freedom to exercise one's religious belief is unlimited. For example, in *Reynolds v United States* 98 US 145 (1878) it was held that although polygamy was permitted in the Mormon Church as part of its religious belief, it is still prohibited under criminal law.
- <sup>82</sup> See Carpenter (1995) *Beyond belief - religious freedom under the South African and American Constitution* for a critical analysis of the First Amendment and leading case law.
- <sup>83</sup> 330 US 1 (1947)
- <sup>84</sup> Case law in the US is replete with cases dealing with religious freedom. In *Abington School District v Schemp* 374 US 203 (1960) the US Supreme Court held that a statute requiring the reading of versus from the Bible and reciting the Lord's prayer in public schools a violation of the First Amendment. The court ruled that religious exercise of this kind infringed the rights of the plaintiff in this case and as a result school officials were prohibited from authorising religious exercise on school premises.
- <sup>85</sup> *McCollum v Board of Education* 333 US 203 (1948)
- <sup>86</sup> *Engel v Vitale* 370 US 421 (1963)
- <sup>87</sup> *Wallace v Jaffree* 472 US 38 (1985)

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- <sup>88</sup> *Bennett v Liveruae Unified School District* 193 Cal. App. 3d 1012 (1987)
- <sup>89</sup> *Breen v Runkel* 614 F. Supp. WD Mich. (1985)
- <sup>90</sup> *La Rocca v Board of Education of Rye City School District* 404 NYS 2d 537 (1982)
- <sup>91</sup> See for example: *Zovach v Clauson* 343 US 306 (1952) and *Smith v Smith* 523 F. 2d 121 (1975).
- <sup>92</sup> 251 NE 2d 750 (1976)
- <sup>93</sup> 403 US 602 (1971)
- <sup>94</sup> Other noteworthy US cases include: *Cochran v Louisiana State Board of Education* 281 US 370 (1930) which upheld a state law authorising the purchasing and supplying of textbooks to all school children, including parochial school children; *Wolman v Walter* 433 US 229 (1977) which upheld a portion of an Ohio programme which supplied all private school children with the same standardised tests as were used in the public schools; *Meek v Pittenger* 421 US 349 (1975) which upheld textbook loans to private schools.
- <sup>95</sup> In an investigation on the practice of religious freedom in different countries by the Human Rights Committee on the Elimination of Racial Discrimination, the Committee raised the issue of discrimination by an institution against adherents of a particular religious belief. The Committee inquired whether admission *could be denied* on the same grounds to private educational institutions, that is institutions not maintained by the state or which do not receive state aid since no citizen could be denied admission to educational state institutions or institutions receiving financial aid from the state on grounds of race, language, culture of religion (Tahzib 1996:389). The Committee raised questions concerning parental rights to direct their children's education and requested clarification on the compulsory or non-compulsory nature of religious instruction in schools. Committee members also asked whether an atheist student would be compelled to participate in religious services. *Prima facie* the questions would appear straightforward. However, it is complex with no conclusive decisions emerging from States Parties, international law or the courts.
- <sup>96</sup> (1992) 3 All ER 277

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<sup>97</sup> An exception to this is found in the Northern Ireland Fair Employment Act of 1976 which makes discrimination on religious and political grounds unlawful in the private and public spheres of employment. Thus in *Mullory v Minister of Education* (1975) IR 88 a scheme which excluded certain secondary teachers because they were members of religious orders was struck down.

<sup>98</sup> (1980) ICR 310

<sup>99</sup> (1984) 2 S.C.R. For a thorough study on the cases leading up to this Supreme Court case see M Parker-Jenkins (1983), *Rights in conflict: the Margaret Caldwell case*.

<sup>100</sup> (1978) 89 DLR 3d 278 Ont. Ca

<sup>101</sup> (1983) 142 DLR 3d Ont. Div. Ct

<sup>102</sup> (1978) 1 ALL ER 574

<sup>103</sup> *Ahmed v UK* (1982) 4 EHRR 126

<sup>104</sup> 723 P.2d 298 (Ore. 1986), 107 S.Ct 1597 (1987)

<sup>105</sup> It is interesting to compare this case with the UK case of *Mandla v Dowell Lee* (1983) 2 AC 548 in which a Sikh boy was denied admission to a school on the ground that he wished to wear a turban. The principal of the school objected on the ground that the turban contravened the school's rules and student's dress code. The House of Lords, however, ruled that Sikhs are an ethnic group as well as a religious group and are therefore protected by the Race Relations Act of 1976. The claim of indirect *racial discrimination* was successfully advanced. Another example of dismissal for religious cause is found in the USA case of *Bischoff v Bothers of Sacred Heart* 416 So.2d 348 (La. App 1982) in which a Catholic teacher's contract was declared void because she had concealed the fact that she had remarried contrary to the teaching of the sponsoring church.

<sup>106</sup> Other provincial legislation have similar provisions.

<sup>107</sup> Confidential interview with a school principal and a member of a school's governing body.



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<sup>108</sup> See chapter 3 on general issue of limitations. Also Article 9(2) of the ECHR and Article 18(3) of the ICCPR.

<sup>109</sup> For example: In *M.A.S, W.A.T & J-A.Y.T v Canada* three Canadian citizens and members of an organisation named 'Assembly of Christ of the Universe' were charged with contravening the Canadian Narcotic Control Act for insisting that the use of marijuana was a necessary part of their religion. They alleged that their rights had been violated. The UN Human Rights Committee held that a belief in the use and distribution of a narcotic drug could not be brought within the scope of Article 18 of the UN Declaration of Human Rights. Likewise, in *Bhinder v Canada* a Sikh's work contract as a maintenance electrician was terminated because he refused to wear safety headgear during work. The Human Rights Committee found that 'if the requirement that a hard-hat be worn is regarded as raising issues under Article 18 then it is a limitation that is justified by reference to grounds laid down in Article 18, section 3 (Tahzib 1996:278-279, 294).

## **CHAPTER 6**

### **SUMMARY OF KEY ISSUES AND FUTURE CHALLENGES FACING PRIVATE SCHOOLS IN SOUTH AFRICA**

#### **6.1 INTRODUCTION**

Since the mid 17th century, private schools have secured an important place in the South African education system, antedating state schools. Clearly they have played a substantial role in providing an alternative education to state education, and have brought about diversity to the education system, albeit for a relatively small number of students. However, in spite of the important role private education has played in South Africa, it has been at the centre of debate and controversy for many decades. Chapter 2 provided examples of the hostility between the State and the private sector and chapters 3 and 5 highlighted some of the arguments that have been posited against the existence of private schools. Notwithstanding these arguments, private education in South Africa is growing in importance and has received legal impetus in terms of the Constitution. In keeping with international human rights law and experience, the right to freely choose, establish and maintain private schools according to one's educational, religious and philosophical convictions is safeguarded by the Constitution.

#### **6.2 REVIEW OF THESIS**

Despite the interest in and increasing importance of private education in South Africa, little research has been conducted in this area. The few studies that have been conducted deal mainly with the historical development of private education and/or the financing of private education. In order to make a contribution to the field of private education and education law, this study focused on the legal status of private schools within the new constitutional dispensation and certain legal issues relating to the management of private schools.

Chapter 1 described the research problem, aims and methodology of this study. It also gave a brief explanation of the legal framework within which the research was conducted.

Chapter 2 traced the historical development of private schools from a legal perspective. The discussion in this chapter illustrated the way in which legal processes, which are embedded in the political and social context of the day, influenced the nature and development of private schools and, in particular, the relationship between the State and the private school sector. The discussion also shed light on several important aspects including the shift in control of education from private entities to the State, the conflict and animosity between the State and private sector and the fact that the autonomy of private schools was not immune to state control. Chapter 2 thus provided an essential context for further discussion and understanding of the legal position of private schools today.

Building on chapter 2, chapter 3 described the nature, purpose and diversity of private education today. Perhaps the most significant contribution of chapter 3 was to try to define and explain the legal position of private schools within the current constitutional framework, and to analyse the scope and application of the bill of rights to private schools. The discussion in chapter 3 thus focused on the external legal context of private education.

Chapter 4 briefly explained the construction and administration of the postal questionnaire used to survey responses of private school principals to selected legal-managerial issues. Chapter 4 highlighted the difficulty of securing substantial data on private schools during a period of transformation. However, the data gathered provided useful information that served as a springboard for the discussion in chapter 5 which addressed the following key issues: private school governance, private school finance, the appointment, dismissal and discipline of teaching staff, the registration and discipline of students and religious freedom in private schools. At the centre of the discussion in chapter 5, which flowed from the findings and the literature review, was the question of state control and regulation, and its impact on the autonomy of private school governance.

This final chapter concludes the study with a summary of the key issues to emerge from the study and discusses challenges facing private schools in South Africa today.

### **6.3 SUMMARY OF KEY ISSUES AND CHALLENGES**

This section summarises key issues in private education which emerged as dominant themes throughout the study.

#### **6.3.1 The private law/public law dichotomy**

An important issue to emerge from this thesis is the dichotomy between private law and public law. Traditionally, the law has been classified into private law and public law (see chapter 1). This distinction, however, has been the subject of debate for many decades. While some still regard the distinction as meaningful, others view it as a false dichotomy given the extent to which these fields of law overlap (see Harlow 1980; Horwitz 1982 & Mnookin 1982). For instance, Kleyn and Viljoen (1996:105) note that the distinction is often artificial and unrealistic owing to the fact that the State does encroach on private law, for example, when the State dictates certain contractual relationships between the employer and employee in legislation. But, the basic distinction is still important for understanding the law in general. Wiechers (1985:9) also points out that in the modern state, the sphere of private law is increasingly being encroached upon by the State thereby further blurring the distinction. In this regard, Van Aswegen (1995:51) states that 'probably the most striking example of this infusion of public law and private law is to be found in the development of modern labour law'. The blurring of private law and public law is even more evident in terms of South Africa's new constitutional democracy with its supreme constitution and justiciable bill of rights in which the State guarantees and protects the fundamental rights of the individual both in the private and public sphere. Van Aswegen (1995:51) notes that the erosion of boundaries between the public and private sphere is also reflected internationally in the area of human rights whereby the protection of fundamental human rights has gradually expanded to include the relations between private individuals.

The problem of drawing a distinct line between public law and private law is also evident in the case of private schools, which are increasingly being treated in the same way as public schools, irrespective of their legal status. It is generally assumed that, as private entities, private schools operate primarily in the field of private law. In other words, private school relations and operations are largely

based on contractual agreement. However, this is clearly not the case owing to the extent of state control and regulation over private schools, irrespective of their legal status. In this regard, the growth of public funding to private schools has contributed to the increased private-public blurring. Thus, although private schools are governed by private law, their external relations and internal operations are also governed by public law. Since private schools form an integral part of the education system and operate within the education bureaucracy, they are subject to the same national and provincial education laws as public schools with respect to matters such as education norms and standards, teacher qualifications, compulsory school requirements and curriculum and examination requirements. Likewise, their internal operations with respect to governance and day-to-day management are also influenced and controlled by public law principles. Moreover, private schools are obliged to meet various constitutional standards in the development of education policies and procedures. Therefore, throughout the study, cognisance was taken of the application of private law to private schools as well as the 'public' nature of private schools and the application of public law, and consequently the direct and indirect control of the State over private education in South Africa.

Against this background, the dichotomy between private law and public law raises a few pertinent questions. The first is whether there is in fact a meaningful legal difference between private schools and public schools, especially in view of the public funding disbursed to private schools that results in them being treated the same as public schools irrespective of the different legal status. The short answer to such a question would be yes, that legally private schools are not the same as public schools and need to be treated differently. Private schools still differ from public schools in terms of ownership, funding, their basic character, how they are established, controlled and managed and their underlying education philosophy and purpose. Thus even though private schools might receive some state funding or that there is some other 'state involvement', this should not derogate from their private status and all that goes with being a private entity. The challenge in this respect is to find a balance between the private and public domain and to determine when the balance has shifted too much toward public funding and control (see table 6.1). Secondly, should certain activities in private schools be considered purely 'private' to the extent that they

lie beyond state control and regulation and, if so, what activities should be considered 'private' and why? The second question is posed not with the intention of providing an answer, but rather to raise it as an important issue for debate and consideration when developing future private school law.

### **6.3.2 Definition and categorisation of private schools**

An associated problem arising from the private/public dichotomy is that of defining 'private education'. This issue has presented itself as a problem from the outset of the study (see section 3.2). The term 'private education' is used in different ways and it has proved inadequate to describe the diversity of the private school sector and the complexity of the legal, administrative and financial relationship that exists between the private school sector and the public education system. Traditionally, the concept 'private schools' describes those schools owned and managed by individuals or corporations, but mostly religious organisations, that are totally independent of state control or funding. While this might have been applicable in the past (especially prior to the existence of state education and state aid), the definition is no longer valid for the vast majority of so-called private schools which are largely 'public entities'. Likewise the term 'independent' does not accurately describe the legal, administrative and financial status of private schools.

In South Africa, there are only a few private schools that can be classified in terms of the original meaning of 'private education' since the majority of private schools receive substantial state funding and none fall outside the administrative and legal control of the state education system (see chapter 5). There is therefore a need for an operational definition that takes into account this diversity and distinguishes between those private schools that are not purely public but are more 'quasi-public' by virtue of their legal status and those that are completely independent by virtue of their financial position. For instance, from the survey data collected, it is possible to categorise private schools into distinct groups (see table 6.1):

**Table 6.1 Categorisation of private schools**

	PRIVATE			
	Pure	Strong	Moderate	Weak
Governance	Completely independent	Mostly private management	Combination of private and State	Privately owned but mostly State controlled
Funding	None	15%	45%	85%

The categorisation of private schools is therefore closely related to the degree of state control and regulation. Schools that receive substantial aid from the State are likely to be subjected to far greater state intervention and regulation. This does not mean, however, that they lose their private status. Examples cited from other countries illustrate the way in which private schools may be funded directly and indirectly while retaining their basic autonomy. The fact that the private sector is so disparate means that policy makers need to take into account the diversity of ownership and governance structures of private schools.

### **6.3.3 State regulation of private schools**

The fact that the State has a legitimate interest in education and a fundamental obligation to provide education is not disputed. The consequences of what happens when a state fails to fulfil its responsibility is evident in the crisis experienced in black education in South Africa. However, the *degree* of state control and intervention in education is problematic. This becomes more so when the school is a private enterprise.

State interference and control over private schools remains a major concern for the private school sector. While private schools are free to develop their own policies on a range of matters, they are expected to conform to state regulations, which seem to be increasing. Private schools are subject to a higher degree of state regulation than would likely be tolerated by any other ordinary private organisation. It has also been argued that although private schools are regarded as autonomous bodies in that they are not government agencies per se, they do form part of the whole education system (which is a state bureaucracy) and are therefore subject to state control. Moreover, while private schools seek to be

independent from the State, as in the case of other countries, in South Africa the State has maintained a tight grip on private education. In chapter 2 the confrontational relationship between the State and private schools was examined in its historical context.

As already mentioned, private schools are not independent of state control. There are many areas over which the State exercises some control. This is illustrated in the discussion on school governance, the hiring and firing of teachers and the selection and discipline of students (see chapter 5). Clearly, the interest of the State in achieving the goals of education are the same regardless of whether it is received in a private or a public school. Therefore, the State imposes regulations on private and public schools. However, there is a difference in the nature and extent of state regulation. With regard to school governance, the hiring and firing of teachers and the selection and discipline of students, public schools are controlled by a vast body of state administrative rules and regulations. On the other hand, private schools are not subject to the same degree of control but nonetheless are required to comply with various state regulations as discussed in chapter 5.

While a certain degree of state control over private schools is universally accepted, the challenge to South African education policy makers and lawmakers is to determine what can be considered reasonable state control over private schools, and the maximum level of control that can be justified for achieving legitimate goals of education. Clearly, a high degree of control of private schools raises deep concerns about choice, liberty, diversity, autonomy, quality and innovation. On the other, inadequate state control may result in the proliferation of unscrupulous fly-by-night schools that bring the private school sector (and ultimately the whole education system) into disrepute by providing an inferior education. In other words, it is necessary to have legal rules and regulations to regulate education, but these cannot be developed in a legal vacuum. Due consideration needs to be given to the social, cultural and political context of the school environment.



#### **6.3.4 State funding of private education**

Public financing of private education is an issue that has evoked intense interest and debate in South Africa and elsewhere. Arguments for and against public funding for private schools continue to be advanced. Advocates argue that private schools should receive state aid because of the important contribution private schools make to education and the fact that parents should be able to choose private schools without being financially penalised. On the other, opponents of private education argue that state aid to private schools should not be permitted as it draws funding away from public schools and undermines confidence in the public school sector. More importantly, however, it is argued that public funding of private education only encourages and furthers social, cultural and economic exclusivity. In spite of the intensity of the debate, experiences of other countries provide some useful observations which should be of interest to education policy makers and lawmakers in South Africa (see chapter 5).

The first observation is that most countries in the world accept private schools and provide substantial funding for their maintenance. The move to drastically reduce or eliminate aid to private schools in South Africa will place a far greater financial and administrative burden on the State if it is required to absorb those schools that are forced to close and become fully integrated into the public sector. Secondly, the establishment and funding of private schools have been given legal effect in the constitution and/or statutes of various countries. Thirdly, the form of funding varies. The nature and extent of funding is influenced by various factors, including economic, political and religious considerations. Even countries, such as the USA and Canada, where private schools do not normally receive direct funding, provide various forms of indirect funding. Thus, international experiences provide numerous examples of how state aid can be provided to private schools without undermining the public sector. A final observation is that public funding of private schools is accompanied by greater state control but that this control varies. For example, in the Netherlands, private schools are highly regulated and controlled by the State while in Australia, government funding of private schools was not accompanied by any substantial increased regulation of private schools (Sherman 1983:655). It is recommended then, that when deciding on regulations concerning private school funding, it is

not only important to take into account the legal position of private schools but also to consider the moral imperatives.

### **6.3.5 Implications of the South African bill of rights for private schools**

Throughout this study, the role of fundamental human rights in private education has formed a major part of the discussion. In South Africa, the continued existence of private schools and the right to choose an education according to one's religious and philosophical beliefs and convictions are also protected by the Constitution. While the changing legal context in South Africa has had a major effect on education in general, both private and public, the single most important legal development has been the implementation of the bill of rights. The bill of rights has formed the foundation for all new education legislation, which is a major departure from apartheid legislation. It has directly and indirectly influenced all aspects of education policy making and law. For instance, legal provisions dealing with aspects such as the organisation and structure of schools, the nature and composition of school governing bodies, student discipline, language policy, religious policy, personnel matters and parent participation in education, have all been framed within the context and language of the bill of rights. In turn, this has significant implications for the way in which schools are organised, governed and managed on a day-to-day basis. Consequently, the legal role, position and duties of school governors, principals, teachers, students and parents have changed.

While this is particularly evident in the case of state schools, it is equally true of private schools. In chapter 3 the controversial issue of the horizontal application of the bill of rights was discussed. Although not expressly stated in the Constitution, it was argued that the bill of rights does find application in private schools. It would now appear that this view has been vindicated in section 8 of the 1996 Constitution which, according to Wolhuter (1996:11-13), constitutes a clear indication of direct horizontality by the inclusion of the judiciary and private persons within its ambit. Moreover, section 8(3) now incorporates guidelines for the judiciary in the application of the bill of rights to private persons (see Appendix C). However, the question of horizontality still remains a contested issue and, in terms of private schools, is yet to be tested in the Constitutional Court.

Thus while the Constitution guarantees the right of private schools to exist, it has also changed the legal context in which private schools operate. Although private schools remain 'independent', mainly by virtue of their private ownership, they, too, are required to operate within the parameters of the bill of rights (see chapter 3). In chapter 5, the dual private/public status of private schools was examined in terms of governance, funding, staff appointments and discipline, student admission and discipline and religious issues. The discussion demonstrated the way in which the bill of rights as well as national and provincial legislation influence the governance and autonomy of private schools.

The manner in which the bill of rights has affected education policy making and practice will continue to have important consequences for private and public schools. Undoubtedly, the bill of rights poses difficult questions and challenges for private schools. For example, the following are some of the challenging questions that have been raised in this study:

- Should private schools continue to receive state funding and, if so, on what basis?
- Should private schools be allowed to discriminate on the basis of religion?
- Should private schools have complete autonomy over student discipline matters that would allow them to use corporal punishment?
- Should private schools be entitled to make it compulsory for students to participate in religious activities?

It is inevitable that the tension between competing rights and interests within education, both public and private, will give rise to many areas of conflict which often result in litigation. To this end, private schools in South Africa face the challenge of protecting their right to exist and to manage their affairs accordingly, while at the same time respecting the individual rights of teachers, students and parents. Thus, in the course of deciding on such legal and moral issues, the judiciary will need to balance society's interests, as reflected in the Constitutional values (see section 3.5.1.3) and the bill of rights against the rights of private schools.

### **6.3.6 The Constitution of the Republic of South Africa Act 108 of 1996**

On 10 December 1996 the new Constitution of the Republic of South Africa Act 108 of 1996 was signed and formally approved by President Mandela. This Constitution marks the end of an important transitional phase in the constitutional development and transformation of South Africa. Since the 1996 Constitution was only approved after the completion of this study and was not in force during the study period, the research remains located within the context of the 1993 Constitution. The 1993 Constitution provided the basis for the new education law that has materialised since 1994. Moreover, no cases have been adjudicated against the 1996 Constitution. However, notwithstanding the changes effected in the 1996 Constitution, the basic content of most of the provisions dealt with in this thesis have not changed substantially and the discussion and problems raised remain equally pertinent under the 1996 Constitution. As pointed out in the preceding discussion, the new democratic constitutional dispensation has had a profound effect on education policy and practice on all levels of education. It remains to be seen how the 1996 Constitution, especially the bill of rights (now contained in chapter 2 of the Constitution), will be applied and interpreted in the private and public school arena. However, in order to facilitate comparisons and cross-referencing within this study, the relevant sections from the 1993 Constitution and the 1996 Constitution have been tabulated in Appendix C.

### **6.3.7 Private school law**

Throughout the history of South African education, education legislation has dealt with private education in a somewhat cursory manner. Moreover, legislation for private and public schools has not been separate. In general, rules and regulations relating to private education have dealt with registration, health and safety matters, subsidisation requirements and teacher qualifications. It was only in 1986 that the first piece of legislation dealing solely with private schools was promulgated in the form of the Private Schools Act 104 of 1986. However, this Act was only applicable to 'white' private schools registered under the House of Assembly. Although this Act did recognise the lawful status of private schools, its main purpose was to bring the private school sector under greater state control at a time when relations between the State and the private school sector were less than cordial (see chapter 2). Much of the Private Schools Act has been

repealed by the South African Schools Act 84 of 1996 and provincial legislation. Although the sections dealing with private (independent) schools still relate mainly to registration requirements and conditions for subsidisation, there is an indication of increasing state control over private schools. This is evident in areas which may well be construed as an infringement on the autonomy of private schools. For example, provisions relating to student discipline and participation in religious instruction and activities. Thus although the State has a legitimate duty to develop the legal framework in which all schools operate, more attention needs to be given to the development of private school law which:

- is developed within the spirit of the new democratic constitutional dispensation
- gives effect to the constitutional right of private schools to exist
- recognises, accommodates and promotes the diversity within the private school sector
- provides for the minimum state intervention that is necessary and justifiable for promoting legitimate education goals
- is aimed at promoting self-regulation rather than State control
- addresses the area of home-schooling (an important aspect of private education that lay beyond the scope of this study)
- involves representatives of the private school sector in the law-making process at provincial.

#### **6.3.8 Concluding remarks**

Finally, to return to the research problem, which was stated as follows: *What is the legal status of private schools in South Africa and how does the law affect the organisation, governance and management of private schools in practice?* In addressing this question, the study raised many critical issues on the legal status and governance of private schools in South Africa. These issues were explored from a legal-educational perspective. However, owing to the process of transformation in education and the fact that relevant education law and policy are still in the process of evolving, many of the complex issues which are of concern, remain unresolved. Notwithstanding the inconclusive nature of the problems, reference to South African law as well as international law and foreign case law has helped to understand, explain, compare and interpret various

private school issues and to identify general international legal trends and developments in the private school sphere. While the international approaches will not necessarily be applied to the South African private school context, they are indicative of the way in which complex issues, which are as much about moral and ethical concerns as they are about legal imperatives, can be dealt with. Therefore, international policy and practices can serve as useful guidelines for education policy makers in South Africa. No doubt competing rights and interests in education will result in many legal battles in the coming years, especially in the areas of finance, religious freedom and choice, and it is hoped that this study makes a valuable contribution to the debate and the formulation of sound education policy and private school law.

#### **6.4 FURTHER RESEARCH**

Private education in South Africa is a complex issue that is relatively under-researched. In this study a number of important aspects of private schooling emerged which warrant further research. These include the following issues:

- reasons why parents choose private schooling for their children
- a comparison of private and public school effectiveness and patterns of academic achievement
- the financing of private education, in particular the impact of private school subsidisation on the public school sector
- an investigation into the various forms of state aid and their implications
- constitutional rights of private school teachers
- constitutional rights of private school students
- labour relations in private education
- the meaning and scope of religious freedom in private schools.

## APPENDIX A

### QUESTIONNAIRE DATA

**Table A1 Proprietor of private schools**

	Frequency	Percent
Religious order	54	40.0
Governing body	34	25.2
Board of Trustees	34	25.2
Other	13	9.6
Total	135	

**Table A2 Legal status of private schools**

	Frequency	Percent
Educational trust	28	22.0
Association for non-gain	74	58.3
Close corporation	5	3.9
Other	20	15.7
Total	127	

**Table A3 Body responsible for drafting the school's constitution**

	Frequency	Percent
Religious order	29	21.3
Governing body	52	38.3
Board of Trustees	32	23.5
Other	23	16.9
Total	136	

**Table A4    Organs of governance**

	Frequency	Percent
Religious order	16	11.8
Governing body	92	67.6
Board of Trustees	18	13.2
Other	10	7.4
Total	136	

**Table A5    Main source of funding**

	Frequency	Percent
School fees	110	80.9
State subsidy	18	13.2
Donations	4	2.9
Other	4	2.9
Total	136	

**Table A6    Range of school fees**

	Frequency	Percent
Less than R5 000	64	47.8
Between R6 000 and R20 000	62	46.3
More than R20 000	8	6.0
Total	134	



**Table A7    Percentage of state aid to private schools**

	Frequency	Percent
None	5	3.8
Fifteen per cent	24	18.2
Forty-five per cent	70	53.0
Eighty-five per cent	2	1.5
Other	31	23.5
Total	132	

**Table A8    A private school should only have to account for its financial affairs in so far as it relates to income received from the State**

	Frequency	Percent
Strongly agree	42	31.6
Agree	43	32.3
Neutral	10	7.5
Disagree	24	18.0
Strongly disagree	14	10.5
Total	133	

**Table A9    The more State funding a private school receives, the less autonomous it is**

	Frequency	Percent
Strongly agree	16	12.1
Agree	48	36.4
Neutral	27	20.5
Disagree	34	25.8
Strongly disagree	7	5.3
Total	132	

**Table A10    State funding of private schools should be based on an assessment of school needs by State officials**

	Frequency	Percent
Strongly agree	14	10.7
Agree	32	24.4
Neutral	17	13.0
Disagree	32	24.4
Strongly disagree	36	27.5
Total	131	

**Table A11 State funding of private schools should be based on a per capita grant (which is the same for all schools)**

	Frequency	Percent
Strongly agree	72	54.1
Agree	40	30.1
Neutral	5	3.8
Disagree	11	8.3
Strongly disagree	5	3.8
Total	133	

**Table A12 Appointment of teachers**

	Frequency	Percent
Proprietor	13	9.6
Governing body	59	43.7
Board of Trustees	11	8.1
Proprietor & Gov. body	13	9.6
Other	39	28.9
Total	135	

**Table A13 Terms and conditions of employment**

	Frequency	Percent
Proprietor	14	10.4
Governing body	76	56.3
Board of Trustees	14	10.4
Proprietor & Gov. body	15	11.1
Other	16	11.9
Total	135	

**Table A14 Termination of a teacher's contract of employment**

	Frequency	Percent
Proprietor	14	10.4
Governing body	68	50.4
Board of Trustees	11	8.1
Proprietor & Gov. body	17	12.6
Other	25	18.5
Total	135	

**Table A15 Policy on student admission requirements**

	Frequency	Percent
Proprietor	13	9.6
Governing body	60	44.4
Board of Trustees	10	7.4
Proprietor & Gov. body	10	7.4
Other	42	31.1
Total	135	

**Table A16 Current regulations relating to the admission of students to private schools infringe on the autonomy of the school**

	Frequency	Percent
Strongly agree	17	13.0
Agree	23	17.6
Neutral	34	26.0
Disagree	41	31.3
Strongly disagree	16	12.2
Total	131	

**Table A17 Student's code of conduct**

	Frequency	Percent
Proprietor	11	8.1
Governing body	40	29.4
Board of Trustees	8	5.9
Proprietor & Gov. body	12	8.8
Other	65	47.8
Total	136	

**Table A18 The State should be able to enforce reasonable regulations  
prescribing specific disciplinary procedures for private  
schools**

	Frequency	Percent
Strongly agree	14	10.7
Agree	32	24.4
Neutral	17	13.0
Disagree	32	24.4
Strongly disagree	36	27.5
Total	131	

**Table A19 Provincial legislation on corporal punishment should not be made applicable to private schools**

	Frequency	Percent
Strongly agree	22	16.9
Agree	21	16.2
Neutral	14	10.8
Disagree	36	27.7
Strongly disagree	37	28.5
Total	130	

**Table A20 Policy regarding the expulsion of students**

	Frequency	Percent
Proprietor	12	8.8
Governing body	55	40.4
Board of Trustees	8	5.9
Proprietor & Gov. body	11	8.1
Other	50	36.8
Total	136	

**Table A21 Every student at a private school which receives a State subsidy, should have the right to be exempted from religious education classes and religious practices at the school**

	Frequency	Percent
Strongly agree	5	3.8
Agree	13	9.9
Neutral	11	8.4
Disagree	33	25.2
Strongly disagree	69	52.7
Total	131	

## APPENDIX B

### Questionnaire sent to private schools

#### QUESTIONNAIRE

Survey on legal issues relating to the management of private schools in South Africa.

Please spend a few minutes to respond to each of the following questions as honestly and completely as possible, and return the completed questionnaire in the reply envelope provided.

**All information in this questionnaire is strictly confidential.**

Thank you for your generous cooperation.

#### SECTION 1

1 - 3

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- 1 Does your school have a religious affiliation?

YES NO

4

If yes, please specify .....

5

.....

- 2 Class range

6

Grade 0 - Std 5	1
Grade 1 - Std 5	2
Grade 1 - Std 10	3
Std 6 - Std 10	4
Other	5

If other, please specify .....

.....

- 3 Total number of students .....

7-10

- 4 Number of teaching staff

11

Less than 10	1
Between 11 - 25	2
Between 25 - 50	3
More than 50	4

- 5 School type

12

Co-educational	1
Boys' only	2
Girls' only	3



6 In what year was the school established? .....

13-16

7 What percentage of state-aid does your school receive?

17

None	1
15%	2
45%	3
85%	4
Other	5

If other, please specify .....

8 Operating costs per year:

18

Less than R500 000	1
Between R500 000 and R1 000 000	2
More than R1 000 000	3

9 School fees per student per year:

19

Less than R5 000	1
Between R5 000 and R20 000	2
More than R20 000	3

10 What is the main source of finance for your school?

20

School fees	1
State subsidies	2
Private sponsorship	3
Donations	4
Other	5

If other, please specify .....

11 The proprietor (owner) of the school is a:

21

Religious order	1
Governing body	2
Board of trustees	3
Private individual(s)	4
Other	5

If other, please specify .....

12 The school is governed by a:

22

Religious order	1
Governing body	2
Board of trustees	3
Private individual(s)	4
Other	5

If other, please specify .....

13 The Constitution of the governing structure is determined by the:

23

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify .....

14 The school is registered as:

24

A charitable educational trust	1
A Section 21 association for non gain	2
A Close corporation	3
Other	4

If other, please specify .....

.....

15 The school budget is determined by the:

25

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify .....

.....

16 The policy in respect of tuition fees is determined by the:

26

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify

.....  
.....

- 17 Policy decisions concerning the appointment of teachers are taken by the:

27

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify

.....

- 18 Policy decisions regarding the conditions under which a teacher's employment may be terminated are taken by the:

28

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify

.....

- 19 Teachers' conditions of service are determined by the:

29

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify

.....

- 20 Student admission requirements are determined by the:

30

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify

.....

- 21 The school policy in respect of the students' code of conduct is determined by the:

31

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify .....

- 22 Policy decisions in respect of the conditions under which students may be expelled are taken by the:

32

Proprietor (owner)	1
Governing body	2
Board of trustees	3
Proprietor and governing body	4
Other	5

If other, please specify .....

## SECTION 2

Please complete this section by choosing the option which best describes the position of your school in respect to the items listed in section 2.

- 23 Should the State prescribe minimum regulations in respect of the following aspects?

23.1	Curriculum content	YES	NO
23.2	Medium of instruction	YES	NO
23.3	Admission requirements	YES	NO
23.4	Number of students admitted	YES	NO
23.5	Examination system	YES	NO

33

34

35

36

37

Please give reasons for your answers (optional):

.....

.....

.....

.....

.....

.....

- |   |   |  |    |
|---|---|--|----|
| 24  | Do you agree that the Constitution of the governing structure of your school should be submitted to the MEC for Education for approval?                     | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 38 |
|   |   |  |    |
| 25  | State officials should be able to assess the way in which private schools are managed, for the purposes of quality control.                                 | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 39 |
| Please give reasons for your answer (optional): |   |  |    |
| .....   |   |  |    |
| .....   |   |  |    |
| .....   |   |  |    |
|   |   |  |    |
| 26  | Should all private schools be entitled to a State subsidy?<br>If yes, please give reasons (optional):   | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 40 |
| .....   |   |  |    |
| .....   |   |  |    |
| .....   |   |  |    |
|   |   |  |    |
| 27  | Is the continued existence of your school dependent on a State subsidy?   | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 41 |
|   |   |  |    |
| 28  | If your school experienced serious financial difficulties, would you consider re-integration into the public sector in return for continued public funding? | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 42 |
| Please give reasons for your answer (optional): |   |  |    |
| .....   |   |  |    |
| .....   |   |  |    |
| .....   |   |  |    |
|   |   |  |    |
| 29  | Should private schools be bound by State regulations in respect of the certification of teachers with regard to minimum qualification requirements?         | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 43 |
|   |   |  |    |
| 30  | Is mandatory membership of a professional teachers' association a condition of employment at your school?   | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 44 |
|   |   |  |    |
| 31  | Are teachers required to belong to a particular religious denomination to qualify for employment at your school?  | <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">YES</div> <div style="border: 1px solid black; display: inline-block; padding: 2px 5px;">NO</div> | 45 |

32 Is it compulsory for your teachers to participate in all official religious activities (including assemblies)? YES NO 46

33 Are teachers employed at your school required to sign a written contract of employment? YES NO 47

34 Are the basic terms and conditions of employment stated in your school's employment contract for teachers? YES NO 48

35 Are the reasons for which teachers can be dismissed from your school listed in their employment contract? YES NO 49

36 Which of the following procedures are made available to teachers at your school in respect of dismissal for misconduct?

36.1	Written notification of charges	YES	NO	50
36.2	Opportunity for a hearing	YES	NO	51
36.3	Access to evidence	YES	NO	52
36.4	Hearing before an impartial tribunal	YES	NO	53
36.5	Legal representation	YES	NO	54
36.6	Transcripts of the hearing	YES	NO	55
36.7	Right to appeal against an adverse decision	YES	NO	56

37 Are all students required to write an admission examination? YES NO 57

38 Are parents required to sign a written contract with the school prior to a student's admission? YES NO 58

39 Are students required to belong to a particular religious denomination to qualify for admission? YES NO 59

40 Are parents required to sign a student's code of conduct before their children are admitted to your school? YES NO 60

41 Does your school's student code of conduct contain the following?

41.1	All school rules	YES	NO	61
41.2	Reasons for which students can be suspended or expelled	YES	NO	62
41.3	Details of disciplinary procedures	YES	NO	63
41.4	Sanctions for violating school rules	YES	NO	64
41.5	Procedures relating to a discipline inquiry	YES	NO	65
41.6	Procedures relating to disciplinary appeals	YES	NO	66

### SECTION 3

Please respond to each item in this section by choosing only ONE of the five alternatives.

SA = Strongly agree, A = Agree, N = Neutral, D = Disagree, SD = Strongly Disagree

		SA	A	N	D	SD	
42	State funding of private schools should be based on an assessment of school needs by State officials.						67
43	State funding of a private school should be based on a basic per capita grant (which is the same for all schools).						68
44	A private school should only have to account for its financial affairs in so far as it relates to income received from Government sources.						69
45	The more State funding a private school receives, the less autonomous it is.						70
46	Current State regulations relating to the admission of students to private schools infringe on the autonomy of the school.						71
47	All disciplinary procedures, pertaining to teachers and students, that are determined by the governing body of a private school should be subjected to external audit.						72
48	The State should be able to enforce reasonable regulations prescribing specific disciplinary procedures for private schools.						73
49	Provincial <b>education regulations</b> on corporal punishment should not be made applicable to private schools.						74
50	Every student, at a private school which receives a State subsidy, should have the right to be exempted from religious education classes and religious practices at the school.						75

Please write any further comments or suggestions on legal issues facing private schools which you feel are important (optional).

.....

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**THANK YOU FOR THE TIME AND EFFORT YOU HAVE TAKEN TO  
COMPLETE THIS QUESTIONNAIRE**  
Return address: PO Box 53, North Riding, 2162

## APPENDIX C

### A comparison of relevant sections of the 1993 and 1996 bill of rights

Constitution Act 200 of 1993	Constitution Act 108 of 1996
<p><b>Application</b></p> <p>7(1) This chapter shall bind all legislative and executive organs of state at all levels of government.</p> <p>(2) This chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this Constitution.</p> <p>(3) Juristic persons shall be entitled to the rights contained in this chapter where, and to the extent of the nature of the rights permit.</p>	<p><b>Application</b></p> <p>8(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.</p> <p>(2) A provision of the Bill of Rights bind a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right</p> <p>(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-</p> <p style="padding-left: 40px;">(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and</p> <p style="padding-left: 40px;">(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)</p> <p>(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.</p>



### **Freedom and security of the person**

- 11(1) Every person shall have the right to freedom and security of the person, which shall include the right not to be detained without trial.
- (2) No person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment.

### **Religion, belief and opinion**

- 14(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.
- (2) without derogating from the generality of subsection (1), religious observances may be conducted at state and state-aided institutions under the rules established by an appropriate authority for that purpose, provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

### **Freedom and security of the person**

- 12(1) Everyone has the right to freedom and security of the person, which includes the rights-
- (a) not to be deprived of freedom arbitrarily or without just cause;
  - (b) not to be detained without trial;
  - (c) be free from all forms of violence from either public or private sources;
  - (d) not to be tortured in any way;
  - (e) not to be treated or punished in a cruel, inhuman or degrading way.

### **Religion, belief and opinion**

- 15(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state and state-aided institutions, provided that-
- (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.

## **Freedom of association**

- 17 Every person shall have the right to freedom of association

## **Education**

- 32 Every person shall have the right-
- (a) to basic education and to equal access to educational institutions;
  - (b) to instruction in the language of his or her choice where this is reasonably practicable; and
  - (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

## **Freedom of association**

- 18 Every person shall have the right to freedom of association

## **Education**

- 29(1) Everyone has the right-
- (a) to a basic education, including adult basic education; and
  - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice at public educational institutions where the education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-
- (a) equity;
  - (b) practicability; and
  - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-
- (a) do not discriminate on the basis of race;
  - (b) are registered with the state; and
  - (c) maintain standards that are

not inferior to standards at  
comparable public  
educational institutions.

- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

### **Administrative justice**

24 Every person shall have the right to-

- (a) lawful administrative action where any of his or her rights or interests is (sic) affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is (sic) affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interest unless the reasons for such have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

### **Just administrative action**

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.

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